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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 590

TERM A. D. 1944.

IN THE MATTER

OF

ASSOCIATED GAS AND ELECTRIC COMPANY,
Debtor,

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

—o—

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,
Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,
Respondents and Appellees Below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

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GLOSSARY.

Ageco—Associated Gas and Electric Company, Debtor.

Agecorp—Associated Gas and Electric Corporation, Debtor.

CCs—Convertible Certificates without fixed maturities.

CDCs—Convertible Debenture Certificates and Convertible Debenture Obligations without fixed maturities.

CICs—5½% Convertible Investment Certificates, due November 15, 1938.

COABs—Convertible Obligations, Series A and B, due 2002.

Elias Committee—Appellants Irving Elias, Max Menachen and Michael Moise, constituting the Protective Committee for the Holders of Convertible Obligations Due 2002, All Series (Exclusive of Those Holders Who acquired Same by Direct Exchange for Original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company.

IB and NIB Scrip—Interest Bearing and Non-Interest Bearing Scrip.

Old COs—Convertible Obligations without fixed maturities.

Original Holders of COABs—Holders of COABs who obtained such securities in exchange for CDCs and still retain those securities.

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ASSOCIATED GAS AND ELECTRIC COMPANY,

Debtor,

In Proceedings for the Reorganization of a Corporation pursuant to Chapter X of the Bankruptcy Act.

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IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,

Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents and Appellees Below.

—o—

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Irving Elias, Max Menachen and Michael Moise, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, All Series, (Exclusive of those Holders who acquired same by direct exchange for original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company respectfully shows:

Summary Statement of the Matter Involved.*

Petitioners seek a review of the final determination of the United States Circuit Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Southern District of New York, entered on August 13, 1943, in proceedings under Chapter X of the Bankruptcy Act, for the reorganization of the Debtor, Associated Gas and Electric Company (AGECO)**. Petitioners constitute a Protective Committee for the Holders of Associated Gas and Electric Convertible Obligations Due 2002, Series A and Series B (except original holders of COABs who exchanged them for CDCs).

The order appealed from classified the holders of Convertible Obligations due 2002, all Series (except original holders of COABs who exchanged them for CDCs) and scrip as subordinate to general creditors other than holders of obligations convertible at AGECO's option into stock (897-898, 900)***.

On November 26, 1941, the Disrict Court entered a bar order requiring that proofs of claims against the Debtor, with certain exceptions not here material, should be filed on or before February 28, 1942, (3). Many proofs of claim were filed (4).

Among the claims filed were those of convertible obligation holders and scrip holders, each separately represented by appellants-petitioners committees.

Under date of March 24, 1942, the AGECO Trustee petitioned for an order determining the validity of some of those claims and dividing the claims into classes according to their nature (4). Objections to the types of claims enumerated in the Trustee's petition were there-

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*For the convenience of the Court, the Summary Statement of the Matter Involved is in all respects similar to that contained in the petition of the AGECO Scrip Committee, except for special references pertaining to the particular securities.

**A glossary of the abbreviations used herein precedes the petition.

***Numerical references are to record folios unless otherwise noted.

after filed by the Trustee and by various other parties (31-255).

On October 27, 1942, the District Court referred these claims and objections to Honorable Frederick E. Crane, as Special Master, "to hear the evidence on the issues raised by said claims and objections and to report his findings of fact and conclusions of law as to the validity, priorities and proper division into classes of said claims" (256-289). The Special Master held hearings at which evidence was taken (5) and, on March 31, 1943, filed his report, including his findings of fact and conclusions of law (586-789). The Special Master recommended, among others, that the COAB and Scrip claims should be classified as subordinate to general creditors.

The report thereupon came on for confirmation before the District Court and objections thereto were duly filed (6; 790-809).

Apart from certain claims which are not material to this petition, the relevant claimants treated in the Special Master's report fall into five types:

1. Holders of Convertible Debenture Certificates and Convertible Debenture Obligations without fixed maturities (CDCs).
2. Holders of Convertible Certificates (CCs) and Old Convertible Obligations (Old COs) without fixed maturities.
3. Holders of Convertible Obligations, Series A and B Due 2002 (COABs), or Preferred or Preference Stocks, who obtained their COABs or stock in exchange for CDCs, and who still hold the COABs or stock thus obtained (Original Holders of COABs).*

*We do not include in the phrase "Original Holders of COABs", persons who acquired their COABs otherwise than on an exchange of CDCs, even if they acquired their COABs directly from AGECO.

4. Other Holders of COABs or Preferred or Preference Stocks.

5. Holders of Interest Bearing and Non-Interest Bearing Scrip (IB and NIB Scrip).

At a hearing held on April 14, 1943, the Trustee of AGECO moved that the District Court pass only on certain parts of the Special Master's report, findings of fact and conclusions of law. It appeared in the District Court that a Plan of Compromise and a Plan of Reorganization had been proposed by the AGECO Trustee and AGECORP Trustees and that these Plans made some provisions for Types 1 and 3 (833-839). The order of the District Court dated August 13, 1943, only reviewed conclusions of law 5 and 6 of the Special Master's Report, and the findings of fact relating to those conclusions, and classified the types of claims represented by the petitioners-appellants as subordinate to general creditors of AGECO pursuant to the Bankruptcy Act, Sec. 197 (862; 892-904). The order confirmed certain parts of the Special Master's report but deferred consideration of those types of claims (Types 1 and 3) for which some provision had been made in the Plan of Compromise, and Plan of Reorganization and reserved jurisdiction to pass on the portions of the Special Master's Report relating to them (840-904).

No provision was made for Types 2, 4 and 5, in the proposed Plan of Compromise or the proposed Plan of Reorganization. The Debtor's financial condition is such that subordinate creditors will not participate in any Plan of Reorganization and they accordingly have been given no recognition in a plan recently proposed by the Trustee of AGECO and the Trustees of AGECORP (838-840), which Plan of Compromise and Plan of Reorganization were approved by an order of the District Court

dated September 12, 1944, pursuant to Section 144 of the Bankruptcy Act.

Inasmuch as no provision was made for Types 2, 4 and 5 in the approved Plan of Compromise and Plan of Reorganization, any decision with respect to the fairness of these plans is necessarily dependent, therefore, upon a proper judicial determination that the claimants represented by petitioners are subordinate creditors. The District Court recognized that it was not possible to determine *favorably* the rights of these claimants without an adjudication of the status of the CDCs and the original holders of COABs but the District Court believed that *adverse* determinations could be made on uncontested findings of fact of the Special Master without consideration of the entire record and without adjudicating the status of the CDCs and the original holders of COABs. Accordingly, the District Court proceeded to a determination of the claimants of Types 2, 4 and 5, held that they were subordinate to general creditors, and entered an order so classifying them (839-862; 892-904). The District Court did not consider the remaining findings and conclusions of the Special Master but *assumed* that the issues therein involved would be resolved in favor of appellants (843). The District Court passed only upon those findings of fact and conclusions of law of the Special Master that were relevant to this classification and adopted them with minor modifications (897-903). The findings of fact thus adopted by the District Court are set forth in Appendix C to the opinion of the District Court (874-891).

The effect of the order appealed from is to divide the COABs into two different classes.

Class 1. Holders of COABs Due 2002, Series A and B, which had been issued in exchange for CDCs and which remain in the hands of the persons to whom they were originally issued or their personal representatives.

This class participates in the limited funds of the Debtor (or in the Plan of Compromise and Reorganization of the Debtor).

Class 2. Holders of Convertible Obligations Due 2002, Series A and B, which were in the hands of persons other than the original holders of CDCs who had exchanged them for COABs; this class includes transferees of persons who had originally held CDCs or persons who had exchanged them for CCs, Old COs or for cash. This class does not participate in the limited funds of the Debtor and has been excluded by the Court order appealed from.

The petitioners-appellants represent the second class of COABs described hereinbefore as Type 4.

Most of the COABs were issued by the Debtor in exchange for CDCs (751). On May 31, 1932, there were outstanding in the hands of the public, CDCs in the amount of $36,333,539 (306). On January 10, 1940, there were CDCs outstanding which had not been surrendered in the sum of $3,808,527 (333-334). The CDCs, CCs and old COs were all by their terms convertible at the *company's option* except under certain conditions, into specified classes of its preferred or preference stocks.

The CDCs, CCs and old COs were all purportedly debt securities of AGECO. The CCs and old COs, however, contained subordination clauses substantially like the one that is in the COABs and the IB and NIB scrip (874). The essential difference between the CDCs and the COABs is that the COABs contain a subordination clause whereas the CDCs do not. The subordination clause in the COABs (877-881; 511-516) provides in part as follows:

> "It is the intent hereof that this Obligation and all other Obligations of this issue shall be subordinate to the following (hereinafter called 'Senior

Obligations'), namely: all bonds, debentures and other indebtedness of the Company and of any successor corporation, now or hereafter created and outstanding, except (1) the Obligations of this issue and (2) indebtedness or Obligations convertible at the option of the Company into stock of the Company of any class or subordinated by their terms to other indebtedness or obligations of the Company."

The subordination clause in the IB and NIB scrip is substantially the same (888; 554-557).

The District Court held, in approving the Plans of Reorganization and Compromise of AGECO that FIOs (Fixed Interest Obligations) unconditionally payable as to both principal and interest on specified dates issued pursuant to indentures with Corporate Trustees, were general unsubordinated debt of AGECO. The District Court likewise held that CICs (Convertible Investment Certificates) unconditionally payable as to both principal and interest on specified dates, were likewise senior or general unsubordinated debt of AGECO. The CICs, however, by their terms were convertible at the *option of the company* into preferred stock of the company (575).

The CDCs by their terms were not subordinate to other obligations of AGECO (703). The CDCs by their terms become due on the happening of certain specified events, to wit:

"(a) Default in the payment of interest;

(b) Adjudication of AGECO as insolvent and permanent Receivers appointed for its property;

(c) Becoming bankrupt and voluntary or involuntary petitions being filed;

(d) Upon the transfer of all or substantially all of its assets unless the acquiring company assumed the obligations of AGECO under the CDCs" (690-2).

Prior to 1931 AGECO experienced certain financial difficulties. In 1931 and 1932 AGECO became further involved in financial difficulties and the notorious Mr. Hobson began his financial manipulations, which resulted in his eventual conviction and imprisonment. On April 19, 1932, the COABs were issued pursuant to authority contained in resolutions adopted by the Board of Directors of AGECO (875).

In May of 1932, AGECO first notified holders of CDCs, CCs and old COs that AGECO was exercising its option to convert those securities into stock; at the same time AGECO offered the security holders an option to take the then newly authorized COABs in place of the stock into which they were purportedly being converted. Some security holders held onto their CDCs, CCs and old COs; some exchanged them for stock; the others, the vast majority, took COABs (876). It is estimated that the bulk of the CDCs in the approximate amount of $30,000,000 or more, were exchanged for COABs (751).

In 1936 and 1937 AGECO paid interest, in the form of IB and NIB scrip, to all holders of COABs, however issued or acquired.

Both the COABs and Scrip were assignable, and many of them were sold or transferred by their original holders (884; 890).

The principal amount of COABs outstanding on January 10, 1940, when the Debtor was adjudicated a bankrupt, was $48,846,284. Since January 10, 1940, the Trustee of AGECO has acquired and cancelled COABs in connection with a compromise of certain claims against Howard C. Hobson and others in the principal amount

of $6,756,440 leaving a balance outstanding in the hands of the public in the amount of $42,089,844 (323-324).

The basic contention was made in this litigation before the District Court that AGECO's conversion privileges with respect to the CDCs, CCs and old COs were invalid and that, even if valid, the options to convert were improperly exercised. These contentions are not material here.

The District Court did not rule on these contentions but assumed in favor of appellants that the exchanges of CDCs for COABs were invalid and that original holders of COABs have a right to rescind the transactions (843). The District Court held that persons who merely acquired the COABs by transfer from some other holder of the COABs without an express assignment of any cause of action for rescission, could not take advantage of the assumed invalidity of the CDC exchanges, whether or not the transferor had been a party to a CDC exchange (849-852).

The Special Master found in his Report that CDCs which were valid and outstanding, were *unsubordinated general debt* of AGECO and entitled to participate as such in the funds of AGECO (788). The Special Master also found that COABs by their terms *were not subordinate to CDCs* of any issue which was valid and outstanding inasmuch as the CDCs by their terms were convertible at the option of AGECO into stock of the Company (676). The CICs which were designated as senior or general unsubordinated debt of AGECO were likewise convertible at the option of the Company into stock (575).

The District Court however held that the subordination provisions in the COABs and scrip were valid and enforceable in bankruptcy (854-857). Accordingly an order was entered classifying the claims of all COABs (except original holders of COABs) and scrip, as subordinate to general creditors other than the holders of obli-

gations convertible at AGECO's option into stock (897-898; 900). This is the order which was affirmed by the Circuit Court of Appeals and which petitioners-appellants now seek to review.

This Court Has Jurisdiction.

The jurisdiction of this Court is invoked under subdivision (c) of Section 24 of the Bankruptcy Act, as enacted June 22, 1938.

The date of the entry of the order, judgment and decree of the Circuit Court of Appeals, sought to be reviewed, is July 14, 1944 (R. p. 337). This petition, presented within three months after the entry of the aforesaid order, is timely.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 143 F. (2d) 640. The opinion is also printed in full in the Record (R. pp. 324-337). The opinion of the United States District Court for the Southern District of New York is reported at 53 F. Supp. 107. The opinion is also printed in full in the Record (R. pp. 271-297).

The Circuit Court of Appeals has in this case decided important substantive questions of general federal law which have not been and should be, settled by this Court and in a way probably untenable with the weight of authority (Supreme Court Rule 38, par. 5 [b]).

As stated by the Circuit Court of Appeals

> "the issue involves peculiarly interesting questions of priority and subordination of corporate bonds in that the District Court has made a distinction between original holders and transferees of certain bonds and has subordinated the claims of transferees to an extent which it has not been prepared to go with respect to the claims made by original holders of the same bonds" (R. p. 325).

The decision of the Circuit Court of Appeals sustaining the District Court order differentiating between the original holders of certain bonds and the transferees of the same bonds and permitting one to participate in the funds of the bankrupt and the other not to, is probably untenable and violates the Fifth Amendment to the Federal Constitution, in that it creates an arbitrary and intentional discrimination between creditors of equal rank in violation of the equal protection and due process clause of the Federal Constitution; the decision of the Circuit Court sustains a District Court order creating an unequal distribution between creditors of equal rank in an insolvent estate and hence involves an important question of federal law which has not been but should be settled by this Court (Supreme Court Rule 38, par. 5 [b]).

The decision of the Circuit Court of Appeals as to the validity and enforceability of subordination agreements in bankruptcy and its interpretation of Section 65-a of the Bankruptcy Act, particularly where the subordination agreements in question have been obtained without consideration, and through fraud and misrepresentation, likewise involves an important question of federal law which has not been but should be settled by this Court and is probably untenable and against the weight of authority (Supreme Court Rule 38, par. 5 [b]).

The decision of the Circuit Court of Appeals on the question of the legality and power of a corporation to reserve in its bonds an option to convert its bonds into preferred stock upon the fulfillment of certain conditions precedent, and on the question of whether such conditions were properly fulfilled prior to the exercise of said option, was improper, erroneous and departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision where the District Court assumed that the issues in-

volved would be decided in favor of appellants (843) and the respondents likewise assumed that the issues involved would be determined in favor of appellants. The Circuit Court of Appeals reviewed questions not presented by the Record. In view of the fact that these questions were not raised by the District Court order appealed from but were assumed in favor of appellants, the record on appeal did not contain all the evidence necessary for the proper determination of these questions, nor was there any burden on the part of the appellants to introduce evidence in the record on appeal which was not material to the issues presented on the appeal and which were specifically assumed in appellants' favor. The Circuit Court of Appeals, in seeking to determine questions on the merits which basically affect the rights of the appellants, but which were not presented on the record on appeal by both parties, clearly departed from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision (Supreme Court Rule par. 5 [b]).

The decision of the Circuit Court of Appeals erroneously sustained the procedure and order of the District Court which confirmed only certain conclusions of law and findings of fact pertaining to appellants' substantive rights without disposing of other issues of fact and law equally necessary for the *full* adjudication of the rights and status of the appellants herein. The procedure of the District Court sanctioned by the Circuit Court of Appeals was erroneous and prejudicial to the rights of the appellants where the report of the Special Master was rendered on all the issues and the issues herein were indivisible. This unusual and novel procedure accounts for the necessary assumptions made by the District Court in appellants' favor of the undetermined findings of fact and conclusions of law. The Circuit Court of Appeals recognized the unfairness of this mode of procedure (R.

pp. 331-332) and attempted to remedy it by erroneously ruling on all the issues, even those not determined by the District Court, and hence not presented in the record on appeal (R. pp. 332-334). The Circuit Court of Appeals thus sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision (Supreme Court Rule 38, par. 5 [b]).

Questions Presented.

The questions presented herein involve important questions of both procedural and substantive law. It is contended that the procedure adopted by the District Court as well as the Circuit Court of Appeals exceeded their jurisdiction and departed substantially from the accepted and usual course of judicial proceedings. The substantive issue as stated by the Circuit Court of Appeals, " * * * involves peculiarily interesting questions of priority and subordination of corporate bonds * * * ". The following questions must be considered by this Court:

1. Did the Circuit Court of Appeals err and exceed its jurisdiction in determining issues assumed by the District Court in favor of appellants and not presented in the record on appeal?

2. Was the procedure adopted by the District Court, and sanctioned by the Circuit of Appeals, of determining only certain, but not all, of the issues pertaining to the COABs correct and proper or prejudicial to the rights of appellants herein?

3. Does the Bankruptcy Act permit different recognition or treatment for transferees of securities than is afforded original holders of the same securities?

4. Does a classification of creditors in bankruptcy, which differentiates between original holders of the Debtor's obligations and transferee holders of said obligations, constitute an unequal and discriminatory distribution of an insolvent estate and hence violate the Fifth Amendment of the Constitution in failing to provide equal protection of laws?

5. Assuming that creditors (holders of COABs) were induced by their debtor through fraud or mistake to agree to subordinate their debt to other creditors, without any additional consideration therefor, is the agreement to subordinate contained in these securities enforceable in a court of bankruptcy or equity?

6. Are the COABs by their terms subordinate to any issue of CDCs or 5½% CICs?

7. If the COABs are not subordinate to CDCs or CICs of any issue, which are valid and outstanding, are the COABs entitled to stand and share on a parity in the funds and reorganization of the debtor AGECO with the CDCs and CICs who participate and share as general creditors of AGECO.

8. Is the subordination clause contained in the COABs inconsistent and ambiguous and therefore void?

9. Is the New York law applicable to the rights of all assignees and transferees of COABs?

10. Do the subordination provisions and terms of the COABs make the COABs "illusory promises" so as to give their holders a cause of action against AGECO as general creditors?

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court erred in approving the procedure of the District Court. The District Court exceeded its jurisdiction by passing upon only certain issues pertaining to the COABs and by assuming the other issues in the case to be in their favor. It was impossible to fully determine the rights of these claimants favorably without an adjudication of all the issues presented, although this would incidentally involve an adjudication of the status of the CDCs and the original holders of COABs who were participating in the Plan of Compromise and Reorganization. The District Court's opinion, that adverse determinations could be made against appellants on certain issues, without consideration of all the issues and the entire record, prejudices the rights of the appellants who were entitled to have all the substantive issues determined on their merits in one appeal. The procedure of the District Court, sanctioned by the Circuit Court of Appeals, in effect splits one appeal into several. It must be recognized that the effect of this ruling may be, that after argument of this case on the limited issues presented before this Court, if the contentions urged by the appellants are upheld, it will then first become necessary to go back to the District Court for a determination of the other issues and further appeals may then be taken to the Circuit Court of Appeals and thereafter possibly to this Court. This procedure is unquestionably prejudicial to the rights of appellants and only results in a multiplicity of legal proceedings.

2. The Circuit Court of Appeals erred and exceeded its jurisdiction by passing upon issues not presented by the record on appeal. The District Court determined that adverse findings could be made against the appellants on

certain issues, pertaining only to these appellants, without considering the entire record and without adjudicating the other issues involving the status of the CDCs and the original holders of COABs who participate in the Plan of Compromise and Reorganization of AGECO. This novel procedure accounts for the necessary assumptions made by the District Court in appellants' favor on the other undetermined issues pending before the District Court (R. 843; 897-903). The District Court did not determine the remaining findings and conclusions of the Special Master but assumed that the issues there involved would be resolved in favor of appellants. The Circuit Court of Appeals recognized the unfairness of this mode of procedure (R. p. 331) and erroneously attempted to remedy it by ruling on all the issues, even those not determined and still pending before the District Court. The Circuit Court of Appeals passed upon the question of the legality and power of a New York corporation to reserve in its bonds an option to convert its bonds into preferred stock upon the fulfillment of certain conditions precedent and, in addition, upon the further question whether the necessary conditions precedent were properly fulfilled by the Debtor prior to the purported exercise of such option. The record on appeal did not contain the evidence necessary for the proper determination of these questions, in view of the fact that these issues were not raised by the District Court order appealed from, but were assumed by the District Court in favor of appellants, nor was there any burden on the part of the appellants to introduce such evidence in the record on appeal, since it was the duty of the appellants to exclude from such record any evidence not material or relevant to the issues presented by this appeal. The Circuit Court of Appeals, in reviewing questions on their merits not presented by the record on appeal, basically prejudiced

the rights of the petitioners-appellants and hence so clearly departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The substantive questions involved have a public aspect and are of genuine intrinsic public importance, which call for their most authoritative determination. The questions involved concern the administration by a federal court of the estate of an insolvent quasi-public company and its reorganization. The liquidation or reorganization of such large holding companies both by the federal courts and by the Securities and Exchange Commission, a quasi-judicial and administrative branch of our government, has become increasingly frequent and it may reasonably be assumed from past experience that such reorganizations will occur in the near future. It is essential in the public interest that the questions here presented be reviewed and finally be settled.

4. The District Court has made a distinction between original holders of certain bonds and transferees of the same bonds, and has subordinated the claims of transferees, to an extent which it has not been prepared to go with respect to the claims made by original holders of the same bonds. The District Court by its order created an arbitrary and intentional discrimination between creditors of equal rank and standing and an unequal and discriminatory distribution of an insolvent estate by a federal court charged with its liquidation or reorganization in violation of the due process and equal protection clause of the Federal Constitution as well as the Bankruptcy Act. This District Court order has been sustained by the Circuit Court of Appeals.

5. The decision of the Circuit Court of Appeals upholding the District Court order distinguishing between

original holders of such bonds and transferees of such holders and in permitting one group of such creditors to participate in the bankrupt estate and the other not to, violates the due process and equal protection clause of the Federal Constitution and is in conflict with the applicable decisions of this Court. The decision of the Circuit Court of Appeals violates the petitioners' rights as guaranteed by the Fifth Amendment of the Federal Constitution.

6. The Circuit Court of Appeals and the District Court disregarded the settled law and the hitherto well-established rules of administration and distribution of insolvent estates in permitting a distinction to be made between original holders and subsequent holders of the same bonds. The Circuit Court of Appeals has failed to enforce that settled law and those statutory requirements. Its decision in this proceeding creates erroneous and dangerous precedent likely to introduce confusion into the body of the law, which, in the interest of jurisprudence, should not be permitted to pass uncorrected.

7. The question of the validity and propriety of the discrimination herein practiced and the question whether its contravenes the due process and equal protection clause of the Federal Constitution and Bankruptcy Laws, have never been adjudicated by this Court, so far as our research indicates.

8. The question as to the validity and enforcibility of subordination agreements in bankruptcy under Section 65A of the Bankruptcy Act, particularly where the subordination agreements in question, as assumed by the record below, were obtained without consideration and through fraud and misrepresentation, has never been adjudicated by this Court, so far as our research indicates, and in-

volves an important question of federal law which has not been but should be settled by this Court.

9. The interests at stake and the number of persons affected are very substantial. Involved herein is the elimination, in the distribution of an estate, of claims of over $22,000,000 in principal amount. Involved are the rights of over 36,000 general creditors spread throughout our land who rightfully look to the courts for a fair and equitable administration and distribution of this insolvent estate. Nor is this merely a controversy between private interests in the usual sense, since the questions involved concern hundreds of thousands of investors who daily trade in these securities and others of similar character. It follows that the acts of the federal courts and administrative branches of the federal government who have the duty to supervise the liquidation or reorganization of such quasi-public corporations, shall not violate the United States Constitution and that the petitioners and those similarly situated shall be accorded every protection which the Constitution affords.

10. The public interest and administration of justice will be subserved by this Court's review and by the correction of the patent discrimination and injustice which petitioners believe to inhere in this proceeding.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case, and that the said decree of the United States Circuit Court of Appeals, for the Second

Circuit, may be reversed by this Honorable Court, and that your petitioners may have such other, further and different relief in the premises as to this Honorable Court may seem just and proper, and your petitioners will ever pray.

Dated, New York, October 11, 1944.

IRVING ELIAS,
Chairman of the Protective Committee for Holders of Convertible Obligations Due 2002, et al., Petitioners.

HARRY O. LEVIN,

ABRAHAM MITNOVETZ,
Of Counsel.

Supreme Court of the United States

No. .....

TERM A. D. 1944.

IN THE MATTER

OF

ASSOCIATED GAS AND ELECTRIC COMPANY,
Debtor,

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

—o—

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,
Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,
Respondents and Appellees Below.

Brief in Support of Petition for Writ of Certiorari.

HARRY O. LEVIN,
Attorney for Petitioners.

ABRAHAM MITNOVETZ,
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AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents and Appellees Below.

Brief in Support of Petition for Writ of Certiorari.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second District is reported in 143 F. 2d 640. The opinion is also printed in full in the record (R. pp. 324-337).

The opinion of the United States District Court for the Southern District of New York, is reported in 53 F. Supp. 107. The opinion is also printed in full in the Record (R. pp. 271-297).

The opinion and report of the Special Master is printed in full in the Record (R. pp. 196-263).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24 of the Bankruptcy Act, subdivision (c). A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the petition pursuant to Rule 38 (5) (b), filed herewith (*supra*, pp. 10-13), and petitioners respectfully request that said statement be deemed incorporated in the brief at this point. Judgment was entered in this case on July 14, 1944 (R. p. 337).

Statement of the Case.

The essential facts of the case are presented in the petition filed herewith (*supra*, pp. 2-10) to which petitioners respectfully refer. In the interest of brevity the facts are not repeated here. It will be noted, however, that there are no controverted issues of fact in this case.

Specifications of Error.

1. The Circuit Court of Appeals erred in determining issues not presented in the Record on Appeal and assumed by the District Court in favor of appellants.

2. The Circuit Court of Appeals erred and prejudiced the rights of appellants herein in sanctioning the procedure adopted by the District Court of determining only certain but not all of the issues peraining to the COABs.

3. The Circuit Court of Appeals erred in approving a final District Court Order of Classification of Creditors in bankruptcy which differentiated between original hold-

ers of the Debtor's obligations and transferee holders of the same obligations, and which barred the latter from participating in the Debtor's estate, while permitting the former to participate. The Circuit Court of Appeals erred in failing to hold that this constituted an unequal and discriminatory distribution of an insolvent estate, contrary to the provisions of the Bankruptcy Act, and denied to general creditors the equal protection of the laws granted them by the Federal Constitution.

4. The Circuit Court of Appeals erred in holding the subordination agreement contained in the COABs valid and enforcible in a court of equity and bankruptcy where it was assumed by the District Court and in the Record on Appeal that the subordination agreement in question was obtained without consideration and through fraud and misrepresentation.

5. The Circuit Court of Appeals erred in failing to hold that COABs, which by their terms are not subordinate to any issue of 5½% CICs or CDCs outstanding, are entitled to stand and share on a parity with the CICs and CDCs, who participate in the estate and funds of the Debtor AGECO.

6. The Circuit Court of Appeals erred in failing to hold that the subordination agreement contained in the COABs is inconsistent, ambiguous and therefore void.

7. The Circuit Court of Appeals erred in holding that the New York law is applicable to the rights of all assignees and transferees of COABs irrespective of where such assignments were executed.

8. The Circuit Court of Appeals erred in failing to find that the subordination provisions and terms made the COABs "illusory promises" which gave their holders a cause of action against AGECO as a general creditor.

ARGUMENT.

POINT A.

The Circuit Court of Appeals erred in its procedure and exceeded its jurisdiction.

The procedure adopted by the Circuit Court of Appeals was erroneous in two particulars:

FIRST: The Circuit Court of Appeals erred in approving the procedure of the District Court which determined only certain issues or portions of the Special Master's findings and conclusions of law pertaining to the COABs, and which did not consider all of the issues affecting the COABs. The procedure adopted was both novel and irregular inasmuch as the petitioners-appellants for the COABs filed objections to other findings of fact and conclusions of law in the Special Master's report, which, in addition to the conclusions of law in question, had to also be determined in order to adjudicate fully the status of the COABs in their favor. The District Court passed only upon certain issues pertaining to the COABs and assumed the other issues in the case to be in their favor (843).

A procedure which prejudices the rights of any class of creditors on appeal would concededly be improper. It is conceded by respondents that it was impossible to fully determine the rights of these claims in their favor without an adjudication of all the issues presented, although this would incidentally involve an adjudication of the status of the CDCs and the original holders of COABs, who are participating in a Plan of Compromise and Reorganization of the Debtor. The District Court's opinion that adverse determinations could be made against appellants on certain issues, without consideration of all the issues and the entire record, prejudiced the rights of the appellants who were entitled to have all the substantive issues determined in one appeal on their merits.

It is contended that Rule 42 (b) and Rule 54 (b) of the Federal Rules of Civil Procedure are applicable. It will be noted in the case of *Reeves* v. *Beardall*, 316 U. S. 283, 285, this court distinctly states:

> "That rule, the joinder provisions (see Rules 13, 14, 18, 20) and the provision of Rule 42 which permits the Court to order a separate trial of any separate claim or issue, indicate a 'distinct policy' (*Collins* v. *Metro-Goldwin Pictures Corp., supra*, p. 85) to permit the entry of separate judgments where the claims are 'entirely distinct'."

It is specifically stated that it permits the entry of separate judgments where the claims are *entirely distinct*. It will also be noted that Rule 54(b) states that:

> "The Court in any stage upon the determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claims, may enter a judgment disposing of such claim. * * *."

It is clearly the intention, therefore, to permit the disposition of a particular claim providing *all* of the *issues* material to this particular claim and arising out of the transaction are disposed of, the claim must be disposed of in its entirety and be entirely distinct from the other claims pending before the Court.

This is not true in the instant case since the Trustees before the Circuit Court of Appeals admitted in their brief, it was not possible to fully determine the rights of these claimants, in their favor, without an adjudication of the status of the CDCs and original holders of COABs. The net effect of this ruling will be as follows:

That after arguing this case on the limited issues before the Circuit Court of Appeals and possibly the Supreme Court of the United States, if the contention of the appellants is upheld it will first become necessary then to go back before the District Court to determine fully the status of the CDCs and original holders of COABs, in which case it may become necessary to again review these other questions before the Circuit Court of Appeals and possibly the Supreme Court of the United States. This procedure is unquestionably prejudicial to the rights of the appellants herein and in effect splits one appeal into several.

It is the right of the appellants to have all issues and questions involving their substantive rights determined by the District Court so that they may be disposed of in one appeal. The procedure followed by the District Court herein was improper and prejudicial to the rights of the appellants herein, particularly where the issues were indivisible as in this case, and the Report of the Special Master was rendered on all the issues.

SECOND: The Circuit Court of Appeals erred and exceeded its jurisdiction by passing upon issues not presented by the record on appeal. The District Court determined that adverse findings could be made against the appellants on certain issues, pertaining only to these appellants, without considering the entire record and without adjudicating the other issues involving the status of the CDCs and the oirginal holders of COABs who participate in the Plan of Compromise and Reorganization of AGECO. This novel procedure accounts for the necessary assumptions made by the District Court in appellants' favor on the other undetermined issues pending before the District Court (R. 843; 897-903). The District Court did not determine the remaining findings and conclusions of the Special Master but assumed that the issues there involved would be resolved in favor of appellants.

The Circuit Court of Appeals recognized the unfairness of this mode of procedure (R. pp. 331-332) and erroneously attempted to remedy it by ruling on all the issues, even those not determined and still pending before the District Court. The Circuit Court of Appeals passed upon the question of the legality and power of a New York corporation to reserve in its bonds an option to convert its bonds into preferred stock upon the fulfilment of certain conditions precedent and, in addition, upon the further question whether the necessary conditions precedent were properly fulfilled by the Debtor prior to the purported exercise of such option. The Circuit Court of Appeals in ruling upon these issues, assumed by the District Court in appellants favor and not presented in the record on appeal, prejudiced the substantive rights of petitioners who contended that the subordination agreement was void as a matter of contract law since it was obtained through fraud and without any additional consideration.

The record on appeal did not contain the evidence necessary for the proper determination of these questions, in view of the fact that these issues were not raised by the District Court order appealed from but were assumed by the District Court in favor of appellants; nor was there any burden on the part of the appellants to introduce such evidence in the record on appeal, since it was the duty of the appellants to exclude from such record any evidence not material or relevant to the issues presented by this appeal. The Circuit Court of Appeals erred in holding "that the record on appeal did not contain all the evidence" and "the Master's finding of fact must be sustained when unopposed by any evidence in the record" where the questions were not presented by the record on appeal. The Circuit Court of Appeals, in reviewing questions on their merits not presented by the record on appeal, basically prejudiced the rights of the appellants and hence so clearly departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

POINT B.

The order of classification, differentiating between original holders of COABs who participate in the debtor's estate and transferee holders of COABs who are barred from participation, is contrary to law, inequitable and discriminatory. If permitted to stand, it will result in an unequal and discriminatory distribution of the insolvent estate. It contravenes the rights of the petitioners under the equal protection clause of the Federal Constitution.

In insolvency proceedings it is established law in the United States that all creditors of the same rank or class participate to the same extent in the funds of the Debtor estate.

Section 65 (a) of the Bankruptcy Act (11 U. S. C. A. 105 [a]) provides:

> "Dividends of an equal percentum shall be declared and paid on all allowed claims except such as have priority or are secured."

The Fifth Amendment to our Federal Constitution has been held under its due process of law provision to guarantee to any person within its jurisdiction the equal protection of the laws.

In *United States* v. *Yount*, 267 Fed. 861, Western District of Pennsylvania, 1920, the government sought to remove a prisoner to another District Court for trial in a prosecution under the Lever Act. The Court ordered the defendant released holding the statute unconstitutional because associations of farmers were unreasonably exempted from the operation of the Act. At page 863 the Court said:

> "It seems reasonably clear that the due process of law provision of the Fifth Amendment is broad

> enough in its scope and purpose to include the 'equal protection of the laws' which no state may deny to any person under the provisions of the Fourteenth."

The effect of the order of classification appealed from is to divide the COABs into two different classes:

Class 1. Holders of COABs Due 2002, Series A and B, which had been issued in exchange for CDCs and which remain in the hands of the persons to whom they were originally issued or their personal representatives. This class participates in the limited funds of the Debtor (or in the Plan of Compromise and Reorganization of the Debtor).

Class 2. Holders of Convertible Obligations Due 2002, Series A and B, which were in the hands of persons other than the original holders of CDCs who had exchanged them for COABs; this class includes transferees of persons who had originally held CDCs or persons who had exchanged them for CCs, old COs or for cash. This class does not participate in the limited funds of the Debtor and has been excluded by the Court order appealed from.

It will be noted that the order of classification not only distinguishes between COABs which have been issued in exchange for CDCs but also differentiates between COABs which had been issued in exchange for CDCs and which remain in the hands of the persons to whom they were originally issued, as distinguished from the class of persons who held these COABs as transferees of persons who had originally held CDCs and exchanged them for COABs. It will be further noted that only the first class participates in the Plan of Reorganization and Compromise of the Debtor. The principal amount of COABs outstanding on January 10, 1940, when the Debtor was adjudicated a bankrupt, was $48,846,284. After the settlement with

Howard C. Hobson and others the Trustees of AGECO acquired and cancelled COABs in the principal amount of $6,756,440, leaving a balance outstanding in the hands of the public in the amount of $42,089,844 (323-324).

On May 31, 1932, there were outstanding in the hands of the public CDCs in the sum of $36,333,539 (306). On January 10, 1940, there were CDCs outstanding which had not been surrendered in the sum of $3,808,527 (333-334). After May of 1932 when AGECO first notified holders of CDCs that AGECO was exercising its option to convert these securities into stock, the bulk of the CDCs in the approximate amount of $30,000,000 to $32,000,000 were exchanged for COABs (751). It will be seen that the bulk of the COABs were originally obtained in exchange for CDCs. The CDCs, as distinguished from the COABs, contained no subordination agreement. The Special Master found in his report that CDCs which were valid and outstanding were unsubordinated general debt of AGECO and entitled to participate as such in the funds of AGECO (788).

Denial of Equal Protection of the Laws.

The fundamental principle of our insolvency laws is equality of treatment of all, and proportionate distribution to all having claims against the limited fund. The principle that equality is equity is especially applicable to the settlement of insolvent estates.

The order of classification, distinguishing particularly between original holders of COABs who had exchanged them for CDCs on one hand, and transferees of such holders, on the other, which order was approved by the Circuit Court of Appeals, conflicts with the Bankruptcy Act and contravenes the equal protection clause of the Federal Constitution.

The decisions of this Court uniformly hold that the law aims at equality in its application and that the Fed-

eral Constitution and Bankruptcy Act were designed to prevent undue favor to one at the expense of another. In *Truax* v. *Corrigan,* 257 U. S. 312, 331, this Court, in discussing the guarantee of equal protection, analogously set forth in the Fourteenth Amendment, said:

> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law * * *. The guaranty (of equal protection) was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons." (Parenthetical matter added.)

Similarly, in *Louisville etc. R. Co.* v. *Bosworth,* 230 Fed. 191, 207, the Court said:

> "And what is it then to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing. And it may be said to include an intention in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken that there was an intention to treat differently or to discriminate. One is always held to intend that which is the natural consequence of what he does. The essence of the Fourteenth Amendment therefore is to forbid discrimination and to require equal treatment on the part of such department of the state in the exercise of its particular function, and its effect is to empower and to make it incumbent on the courts, state and federal, to prevent discrimination and to secure equal treatment."

Any distinction, particularly between the original holders and other holders (transferees, etc.) of COABs which were exchanged for CDCs, is inequitable and discriminatory because it would present an unmerited windfall to the other security holders of the Debtor.

The Special Master found that prior to the act of conversion by AGECO in 1932, all CDC holders were unsubordinated general creditors of AGECO (788).

Assuming for the purposes of this brief, as the District Court necessarily did, that the conversion privilege was illegally or improperly exercised, what was the effect of the alleged act of conversion? What could it actually have accomplished?

The answer must be that if the power to act did not exist, the alleged exercise of the act accomplished nothing. The net result of the alleged act then is a nullity and the certificate holders had the same rights as previously.

What were these rights? One consisted of conveying a right to share in the funds of the estate, whatever they were, as a general unsubordinated creditor.

The CDC holders were entitled to have a portion of the estate and a share of its funds which could have been mathematically ascertained and the other security holders were entitled to have a portion of the estate and a share of its funds which could have also been mathematically ascertained.

Why should only the original holder of the COAB, obtained in exchange for a CDC, receive a share, but not his transferee?

Why subsequently should the estate, or, better still, the other security holders whose share was also fixed, be enriched by the exercise of an act which was void and which could have no legal effect?

Prior to the alleged act of conversion, the share of each CDC holder in the estate of AGECO was fixed and could be mathematically ascertained. So was a share of every other security holder in this fund.

Therefore, the other security holders are being deprived of nothing if *all* the holders of COAB's which were exchanged for CDC's participate in the funds of the estate. On the other hand, if all the holders of COAB's which were exchanged for CDC's do not participate, the share of the other security holders of AGECO are to that extent enlarged and enriched.

This result in itself is clearly inequitable and presents a windfall to one class of security holders at the unmerited expense of another class. The law has never been so unreasonable.

The test should not be who is the person who holds the COAB, but the certificate itself. What does it actually represent, to wit, was it originally exchanged for a CDC?

It is pertinent to note that the undersigned found no other case in bankruptcy reorganization practice where such a distinction was made as sought herein between original holders and transferee holders of a security certificate which was exchanged for another.

Indeed, if this distinction is applied to COAB's, it should be applied to all the other securities of AGECO. It is a well known fact that most of the securities of AGECO, particularly the Fixed Interest Debentures, have been sold in the open market many times and with few exceptions are not in the hands of the original holders.

To increase the equity of such security holders at the unmerited expense of another class of creditors is a windfall which has no justification in law or equity.

The order of classification sought to be reviewed is therefore clearly discriminatory and inequitable and violates the Bankruptcy Act as well as the due process and equal protection clause of the Federal Constitution.

POINT C.

The subordination agreement contained in all the COABs which were exchanged for CDCs, whether in the hands of the original CDC holders or transferees, is void and unenforcible as a matter of contract law since it was obtained through fraud and misrepresentation and no additional consideration was given therefor. It necessarily follows that any distinction between original and other holders of COABs which were received in exchange for CDCs violates the Bankruptcy Act as well as the rights of the petitioners under the Federal Constitution.*

The relationship between debtor and creditor is a contractual relationship under either an express or implied contract and such contract is subject to the rules of law governing contracts.

It is a fundamental principle of the law of contracts that if rights are conferred upon one party there must be a consideration passing to the other party, or such rights are not enforceable in law.

It must be emphasized that the proposition now being considered does not in itself involve the question of fraud in any way, nor the question of whether the transfer of a security which was exchanged through fraud carries with it the assignor's right to bring a rescission action against the person committing the fraud, by the assignee. The question now being considered is solely a question of the law of contracts.

It must be remembered that the District Court assumed in appellants' favor, or the purpose of ruling only on certain limited issues, that the conversion privileges in the CDC's were illegal or, even if valid, were improperly

*This argument, of course, applies only to the COAB's which were received in exchange for CDC's whether in the hands of original holders or not, which it is estimated amounted to 30 to 32 million dollars principal amount.

exercised. The exchange of CDC's for COAB's were, therefore, obtained through fraud or mistake of fact. In any event, no consideration passed from the Debtor to the creditor, who was a general unsubordinated creditor of the Debtor at the time (CDC holder), for the agreement contained subsequently in the COAB by the same creditor to subordinate his debt to the debts owed to other classes of creditors.

Had the Debtor a legal right to convert the CDC's at the time into Preferred or Preference Stock and the Debtor waived such right, there would possibly have been a consideration for such a subordination agreement by the former CDC holders. But, on the contrary, it must be assumed in this case, to wit, that the Debtor had no such right of conversion or could not exercise it.

It is elementary that there must be a consideration to make any contract binding and enforceable in law.

> "The actual consideration for a contract cannot be waived." *Geger* v. *Kalmar Pack & Abrams Consol., Inc.,* 104 Misc. 85-90.
>
> "Were those obligated to consider the nature of this instrument? If it has no consideration to uphold it, it must be treated *nudum pactum.*" *Mendel* v. *Pickhell,* 37 Misc. 813-814.
>
> "It is of course unquestionable that no action may be maintained to enforce a gratuitous promise, however worthy the object to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform and his legal right to do so cannot be disputed * * *." *Presb. Church of Albany* v. *Cooper, et al.,* 112 N. Y. 517-520.

At the time each CDC was exchanged for a COAB through the fraud or misrepresentation of the Debtor,

the Debtor, AGECO, was indebted at the time in the same amount to the holder of the CDC previously.

As stated in the case of *Arend* v. *Emith*, 151 N. Y. 502:

> "No consideration can arise simply from the method of doing an act which it is one's duty to do."

It is also stated in the same case by Vann, *J.*:

> "No consideration can arise simply from the method of doing an act which it is our duty to do. * * * It is a principle of common law from the earliest times that a promise without legal consideration as an equivalent cannot be enforced and that it is well settled 'the performance of an act which the party is under an obligation perform cannot constitute a consideration for a new contract'.
>
> Doing what they were already bound to do furnished no consideration for the promise * * *. The former parted with nothing of their own and the latter gained nothing." *Tolhurst* v. *Powers*, 122 N. Y. 460.

The subordination clause, therefore, in the COAB's which were exchanged for CDC's has no binding effect and is unenforceable in the hands of the original holder or any subsequent transferees.

The holders of the COAB's received nothing in return for their debt being subordinated to any other debt. The subordination clauses in such COAB's which were exchanged for CDC's are mere assertions on the part of the Company and are of no legal effect.

If the agreement to subordinate was void and unenforcible in its inception, against the original holder of the instrument, it is void and unenforcible in the hands

of all subsequent holders or transferees, as a matter of law. The subordination agreement could not be revived simply because of its subsequent transfer. It does not matter in the slightest whether the assignee or transferee of the security knew of the fraud or whether he purchased the security with knowledge that a subordination agreement was printed on its face.

In *In re Aktiebolaget Krueger & Toll*, 96 F. (2d) 768, the Court held that the provision of the Bankruptcy Act that dividends of an equal percentum shall be declared and paid on all allowed claims except such as have priority or are secured means that dividends paid to creditors shall be *pro rata* except where there is a priority given by law or by lawful contractual arrangement between the parties.

In the *Krueger & Toll* case, *supra*, the corporation issued a participating debenture subordinate as to the payment of principal to other debts of the corporation, but by the terms of these debentures the holders received a right to participate in the profits of the corporation in addition to specified interest in return for surrendering their equal right to repayment of principal with said creditors of the corporation. There was a consideration for the surrender of this right and a binding contract entered into between the corporation and these creditors. The decision is based on the proposition that the creditors contracted to subordinate their claims in a written contract which was binding on them and which contained a valuable consideration passing to those creditors. It was because they had a binding contractual arrangement containing a subordination clause that the Court held this clause enforceable.

There being no binding contract to subordinate between the holders of the CDC's who had exchanged them for COAB's and the Debtor, AGECO, there is, therefore, no enforceable subordination clause in the case at bar and the *Krueger & Toll* decision, *supra*, is not applicable.

The holders of COAB's are not estopped from asserting the invalidity of the subordination agreement in the COAB's.

See:

Thomson v. *Simpson,* 128 N. Y. 270;
New York Rubber Company v. *Rothery,* 107 N. Y. 310;
Rothschild v. *Title Guarantee & Trust Company,* 204 N. Y. 458;
Andrew v. *Cohen,* 221 N. Y. 148;
Ruggles v. *Ormrod,* 198 N. Y. 119.

Conversion and subordination clauses in COAB's are no integral part of a security. They must be construed as separate agreements, and, therefore, unenforceable unless there is consideration received by the holders to support them.

In speaking of a conversion clause in a security, the Court in the following case says:

> "This contract, although appearing on the face of the indenture, is in fact a separate independent agreement. It has no part of the bond proper. Its purpose is not to secure the payment of money. Its presence does not affect the negotiability of the bond. Its validity would not impair the liability of the obligor to discharge the debt. It gains nothing in force by reason of its association with the stipulations of the bond. It must be construed as though embodied in a separate writing." *Lisman* v. *Milwaukee, L. S. & W. Ry. Co.,* 161 F. 472-475.

The agreement to subordinate, even if valid otherwise, is not enforcible as to those COABs which were exchanged for CDCs, whether they are in the hands of original hold-

ers or not, since such an agreement must be construed as *nudum pactum,* void in its inception. Hence the distinction made by the order of classification, confirmed by the Circuit Court of Appeals, between original and other holders of COABs which were exchanged for CDCs, is inequitable and discriminatory and brings this cause within the scope of the due process and equal protection clause as defined by this Honorable Court.

POINT D.

The Circuit Court of Appeals erred in holding the subordination agreement contained in the COABs valid and enforcible in bankruptcy.

The order of classification affirmed by the Circuit Court of Appeals, which held that the COABs were subordinate to the Fixed Interest Debentures of AGECO and bars therefrom participation in the Plan of Compromise and Reorganization of AGECO violates the Bankruptcy Act as well as the equal protection of the laws guaranteed by the Federal Constitution.

The COABs by their terms were specifically not made subordinate to any issue of CDCs or 5½% CICs (a Fixed Interest Debenture of AGECO). Under Section 65 (a) of the Bankruptcy Act (11 U. S. C. A. 105 [a]) they must participate on a parity and to the same extent as the CICs or CDCs in the funds and reorganization of AGECO. Both the CICs and CDCs do participate in the approved Plan of Compromise and Reorganization of AGECO. It is submitted by the petitioners-appellants that the subordination clause contained in the COABs is inconsistent, ambiguous and therefore void.

At the hearings before the Special Master petitioners-appellants raised the contention that the subordination clause contained in the COABs must be interpreted to

mean that the COABs are *not* subordinate to any issue of CDCs, in view of the fact that the CDCs were by their terms convertible into stock of the company at the *option* of the *company.*

The terms of the CDCs distinctly state they were convertible into stock of the company at the option of the company (676).

The subordination clause contained in all of the COABs reads as follows:

> "It is the intent hereto that this obligation and all other obligations of this issue shall be subordinate to the following (hereinafter called 'senior obligations'), namely: All bonds, debentures and other indebtedness of the company and of any successor corporation, now or hereafter created and outstanding, except
>
> 1. The obligations of this issue, and
>
> 2. Indebtedness or obligations convertible at the option of the company into stock of the company of any class or subordinated by their terms to other indebtedness or obligations of the company; * * *." (511-512).

The Special Master found in his report that the interpretation urged by the petitioners was correct, and said:

> "The subordination clause may be read, and I so read it, as subordinating the COs to Bonds but not to Convertible Debenture Certificates" (676).

The Fixed Interest Debentures of AGECO, which were considered by the District Court in the Plan of Compromise and Reorganization as senior indebtedness prior in rank to the COABs, amount to approximately $59,000,000. Among the outstanding FID debt are the 5½% CICs due

1938 amounting to the principal sum of $1,260,000. This issue of CICs, secured by an indenture trust, was considered unsubordinated general debt of AGECO and participates fully in the funds and reorganization of AGECO as senior debt.

The Convertible Investment Certificates mentioned above all contain the following provision:

> "This Investment Certificate may, at the option of the Company at any time after, but not before, November 15, 1933 (if the Company is not then in default in the payment of dividends upon its $5.50 Dividend Series Preferred Stock), by notice mailed * * * to be converted into fully paid and non-assessable shares, without par value, of the $5.50 Dividend Series Preferred Stock of the Company, on the basis of one share of such Preferred Stock for each $100 principal amount hereof. * * * The mailing by the Company, as above provided, of notice of conversion, shall *ipso facto* operate as conversion of this Investment Certificate on the date of conversion fixed in such notice, into shares of said $5.50 Dividend Series Preferred Stock of the Company upon the basis hereinabove stated (subject to the right of the holder hereof, as aforesaid, to convert the same on or prior to the date of conversion fixed in such notice, into either shares of stock of Eastern Utilities Investing Corporation or 5% convertible debenture bonds of the Company) * * * " (575).

It clearly appears that the CICs by their terms were convertible at the option of the Company into preferred stock, and hence the COABs are not subordinate to any CICs as well as to any CDCs since both the CICs and CDCs are indebtedness or obligations convertible at the option of the Company into stock and therefore came

within the exceptions contained in the COAB subordination clause.

Regardless of the question of whether the act of conversion, purportedly made by AGECO in May 1932, was valid or not, which was assumed in appellant's favor by the District Court, the Special Master nevertheless found that the 1931 series of CDCs could not have been legally converted due to time limitations, and found that the said CDCs were unsubordinated general debt of AGECO (Special Master's Conclusions of Law 7, 8; fol. 788).

The COABs are specifically, by their terms, on a parity with the CICs and the CDCs which participate in the Plan of Compromise and Reorganization of AGECO.

Section 65 (a) of the Bankruptcy Act (11 U. S. C. A. 105 [a]) provides "dividends of an equal percentum shall be declared and paid on all allowed claims except such as have priority or are secured."

Section 65 (a) above establishes an inexorable rule for distribution of funds, to wit, that creditors' claims which are of the same class or equal in rank to another class, must receive the same *pro rata* dividends which claims of the same or equal class receive. Under Section 65 (a), petitioners submit, the COABs must receive the same share as CDCs or CICs of 1938 in the Plan of Compromise and Reorganization of AGECO.

In the *Krueger & Toll* case, *supra,* the Court held, subdivision (a) of this section means dividends paid to creditors shall be *pro rata* except where there is a priority given by law or by lawful contractual arrangement between the parties. Inasmuch as in the instant case the COABs are on a parity with the CICs and CDCs no priority or preference can be given to the CICs or the CDCs and the *Krueger & Toll* case, above, is not authority for any other finding.

The contention raised by petitioners that the subordination clause contained in the COABs was inconsistent

and void was discussed by the Special Master in his report. The Special Master, in his report, asked (676-677)

> "If they share in this fund on a parity with CDCs to any extent, what becomes of that part of the instrument which subordinates them to bonds?"

The same argument, of course, applied to the CICs, a Fixed Interest Debenture, but this fact was not discovered or known at the time the hearing took place before the Special Master.

In turn appellants ask if they do not share in this fund on a parity with the CICs and the CDCs which are both unsubordinated general debt of AGECO, what becomes of that portion of the instrument which specifically states they are not subordinate to CICs or to any issue of CDCs?

Is the effect of any other conclusion or result not tantamount to a finding that they are subordinate to the CICs of 1938 and the CDCs?

Was it the intent that under certain conditions or events that the CICs and CDCs should share in the estate but that the COABs should not? If such was the intention, should it not have been clearly stated or indicated in the instrument?

It cannot be denied that the COABs are not subordinate to the CICs of 1938, a Fixed Interest Debenture and general unsubordinated creditor. The Special Master also found that CDCs which are valid and outstanding are unsubordinated general creditors of AGECO (Sp. M. Concl. of Law, fols. 7 and 8; fol. 788).

The Special Master's Report attempted to avoid this inconsistency by stating (fol. 677) that COABs cannot take anything which should go to the bonds because these have first call and cited *Bird & Sons Sales Corp.* v. *Tobin*, 78 F. (2d) 371.

The analogy drawn between *Bird & Sons Sales Corp.* v. *Tobin* and the instant case is not in point.

The case of *Bird & Sons Sales Corp.* v. *Tobin* follows and cites the cases of:

> *Searles* v. *Mechanics Loan & Trust Company,* 249 F. 942; and
> *In re George P. Schingel & Sons, Inc.,* 16 F. (2d) 289.

All of these cases held that where a debtor is insolvent or bankrupt and one group of creditors agrees to extend credit to the bankrupt or debtor in order to continue the business for the benefit of all creditors, the agreement between one group of creditors to subordinate their old debt to the new debt is enforceable.

It will be noted that in the case of *Bird & Sons Sales Corp.* v. *Tobin* the creditors whose claims were held to be subordinate agreed in writing to subordinate their claims to induce the other creditors to extend the additional credit to the debtor. In reliance thereon, the new creditors advanced funds to the debtor enriching the debtor's estate which benefited the subordinated creditors. In other words, a consideration flowed from one group of creditors to another.

In the instant case, as distinguished from *Bird & Sons Sales Corp.* v. *Tobin* case, the old creditors are the bonded fixed interest debenture holders and CDC holders of AGECO whose claims arose in the debtor estate prior to the authorization or issuance of COABs.

The creditors who extended new funds to the debtor estate were the COABs. Most of the COABs were issued in exchange for CDCs, which has been held to be unsubordinated debt of AGECO, and many COABs were issued in the first instance for cash or in exchange for se-

curities of other companies (Sp. M. Find. of Fact 45; fol. 765).

The funds and estate of the debtor were accordingly enlarged and enriched and the bond and fixed interest obligations of AGECO benefited accordingly.

There was no agreement ever made between the holders of COABs or any other class of creditors of AGECO as in the *Bird & Sons Sales Corp.* v. *Tobin* case or *Searles* v. *Mechanics Loan & Trust Company,* and *In re George P. Schingel & Sons, Inc.* cases.

It cannot be said that if the COABs share on a parity with the CICs of 1938 and with the CDCs and hence with the general unsubordinated creditors of AGECO, that the other general creditors were prejudiced as in the *Bird & Sons Sales Corp.* v. *Tobin* case.

The participation of COABs in the reorganization or liquidation of AGECO will decrease the estate or fund of AGECO to a much lesser extent than that by which it was enriched and enlarged by the original issuance of COABs.

The District Court has stated that it was the intention in insolvency that the COs were not to receive anything until the bonds or Fixed Interest Obligations were paid in full.

The intention is also clearly and unequivocally expressed in the COABs that the COABs are not to be subordinated to any indebtedness which is convertible at the option of the Company into stock of the Company. This includes, as shown previously, all the CICs of 1938, whether extended or otherwise, and all of the CDCs which are valid and outstanding. Nowhere does there appear any provision or even suggestion that these other classes of debt, to wit, CICs of 1938 or CDCs which are on a parity with the COABs, may participate in the event of insolvency or in bankruptcy, as a general creditor, but that the COABs may not.

On the contrary the intent is clear that whatever the CICs of 1938 or the CDCs receive, the COABs must receive, since they are on a parity and not subordinate to said securities. The theory, expressed by the Trustee and adopted by the lower Court, of taking the share which the COABs would ordinarily receive and then turning over such dividend or participation to the debenture holders and other general creditors to whom it is stated the COABs had agreed to subordinate their claims, is clearly fallacious contrary to the provisions and terms contained in the COABs. The answer simply is that at all times the COABs have a right to ask what share did the CICs of 1938 and CDCs receive? We must receive the same as our agreement specifically says so. Our contract says we are not subordinate to them. It is obvious, therefore, that this method of reasoning can be carried into a complete circle.

The *Krueger & Toll* case *supra* has no application with respect to the instant case. The facts there were different. There were two classes of creditors and one clearly agreed to be subordinate to the other in return for a good consideration. The petitioners herein do not controvert the proposition of law stated by the *Krueger & Toll* case, to wit, that creditors may contract to subordinate their claims in a written contract which is binding upon them if a valuable consideration passed to those creditors, but the facts in this case are entirely different. Here the subordination clause in question clearly states that the COABs are not to be subordinate in any event to the CICs of 1938 and the CDCs, and that the COABs are on a parity with them, and those two latter classes of creditors are participating in the funds of the Debtor estate as General Creditors.

It is for this reason that the appellants contend that the subordination clause in the instant case is inconsistent, ambiguous and invalid, and therefore void.

Certainly, the subordination clause must be strictly construed according to its terms and the inconsistency or ambiguity resolved against the maker of the instrument—in this case AGECO.

Since AGECO is a domestic corporation, organized under the laws of the State of New York the rules of construction of New York State must apply.

It is well settled law in New York State that the rule of strict construction must be applied against the party responsible for the ambiguity or inconsistency.

In *Halpern, Davidoff & Sack* v. *Amtorg Trading Corp.*, Law Journal, March 17, 1943, App. Div. 1st Dept. the Court said:

> "The contract was drawn by plaintiffs. Therefore, any uncertainty or ambiguity of language, such as that which affects the date of the contract's termination, must be resolved most strongly against them, for they were the persons who used it."

In the case of *Gillett* v. *Bank of America*, 160 N. Y. 549, the Court at page 555 said:

> "The reason of the rule that the language of an instrument is to be construed against the person who proposes it rather than against the person who is invited to accept it, is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given, ought to be held to the strict interpretation of them rather than he who only accepts them."

It is respectfully submitted that the Circuit Court of Appeals erred in holding the subordination agreement contained in the COABs valid and enforcible in Bankruptcy.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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Counsel for "Elias" Protective Committee for Holders of Convertible Obligations Due 2002, et al., Petitioners.

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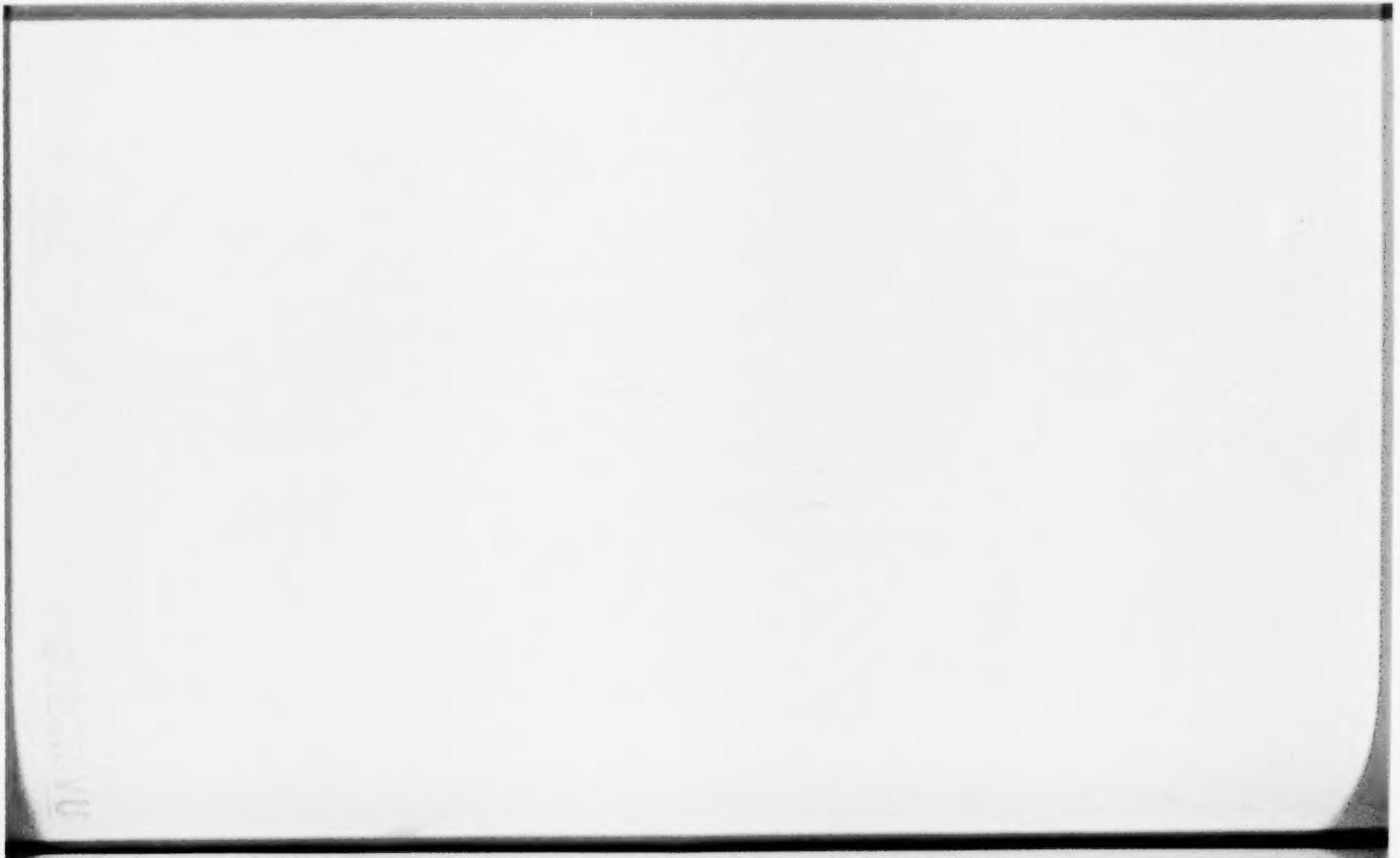

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Supreme Court of the United States

No. 591

TERM A. D. 1944.

IN THE MATTER

OF

ASSOCIATED GAS AND ELECTRIC COMPANY,
Debtor,

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,
Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,
Respondents and Appellees Below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Second Circuit, and Brief in Support Thereof.

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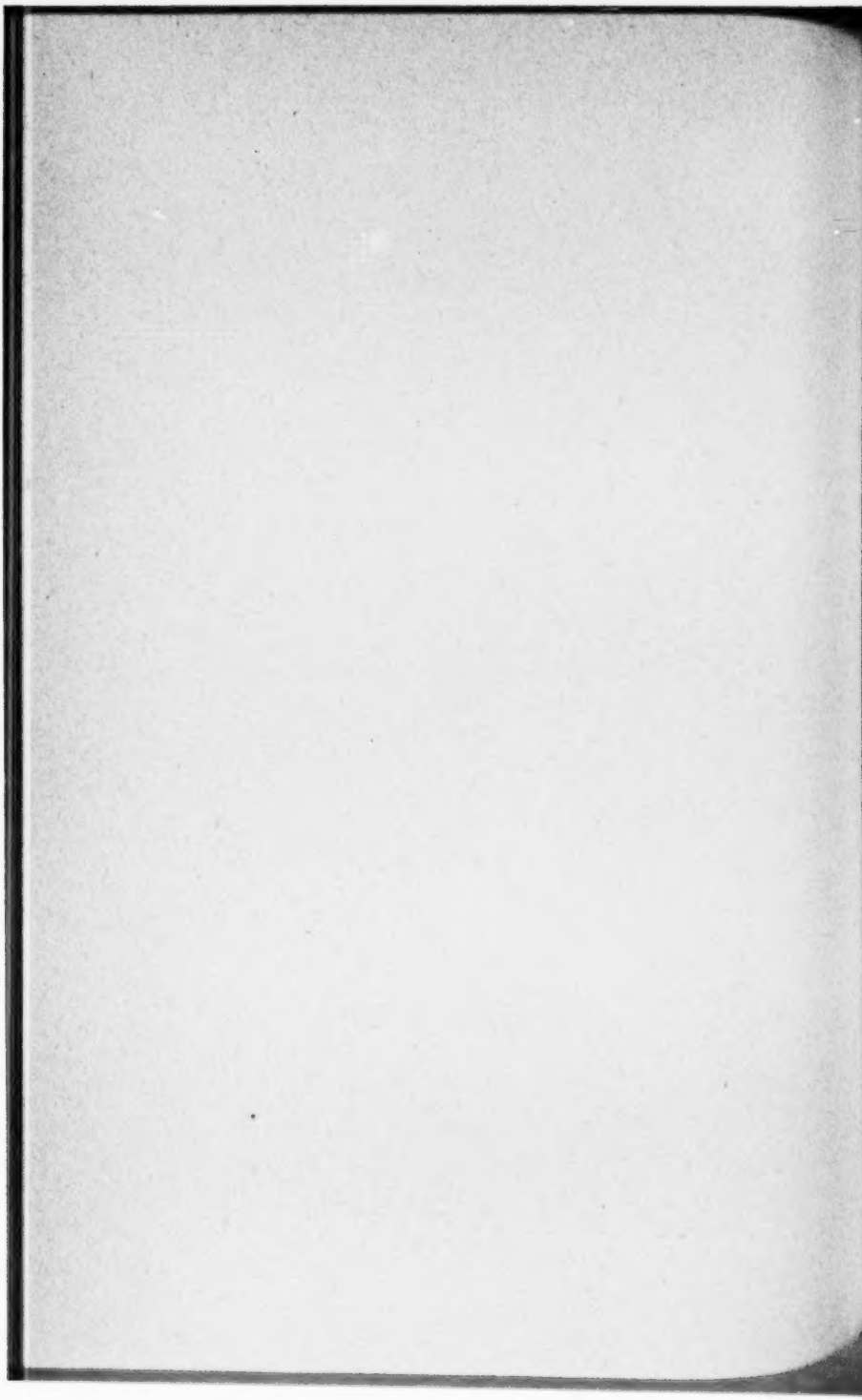

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GLOSSARY.

Ageco—Associated Gas and Electric Company, Debtor.

Agecorp—Associated Gas and Electric Corporation, Debtor.

CCs—Convertible Certificates without fixed maturities.

CDCs—Convertible Debenture Certificates and Convertible Debenture Obligations without fixed maturities.

CICs—5½% Convertible Investment Certificates, due November 15, 1938.

COABs—Convertible Obligations, Series A and B, due 2002.

Elias Committee—Appellants Irving Elias, Max Menachen and Michael Moise, constituting the Protective Committee for the Holders of Convertible Obligations Due 2002, All Series (Exclusive of Those Holders Who Acquired Same by Direct Exchange for Original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company.

IB and NIB Scrip—Interest Bearing and Non-Interest Bearing Scrip.

Jones Committee—Appellants Thatcher C. Jones, Frederick T. Sutton and Russell M. Van Kirk, constituting the Scrip Holders Protective Committee of Associated Gas and Electric Company.

Old COs—Convertible Obligations without fixed maturities.

Original Holders of COABs—Holders of COABs who obtained such securities in exchange for CDCs and still retain those securities.

Supreme Court of the United States

No. .....

TERM A. D. 1944.

In the Matter

of

ASSOCIATED GAS AND ELECTRIC COMPANY,

Debtor,

In Proceedings for the Reorganization of a Corporation pursuant to Chapter X of the Bankruptcy Act.

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,

Petitioners and Appellants Below.

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, et al.,

Respondents and Appellees Below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Thatcher C. Jones, Frederick T. Sutton and Russell M. Van Kirk, constituting the Scrip Holders

Protective Committee of Associated Gas and Electric Company, respectfully shows:

Summary Statement of the Matter Involved.*

Petitioners seek a review of the final determination of the United States Circuit Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Southern District of New York, entered on August 13, 1943, in proceedings under Chapter X of the Bankruptcy Act, for the reorganization of the Debtor, Associated Gas and Electric Company (AGECO).** Petitioners constitute a Protective Committee for the Holders of Associated Gas and Electric Interest Bearing and Non Interest Bearing Scrip.

The order appealed from classified the holders of convertible obligations due 2002, all series (except original holders of COABs, who exchanged them for CDCs) and scrip as subordinate to general creditors other than holders of obligations convertible at AGECO's option into stock (897-898, 900).***

On November 26, 1941, the District Court entered a bar order requiring that proofs of claims against the Debtor, with certain exceptions not here material, should be filed on or before February 28, 1942, (3). Many proofs of claim were filed (4).

Among the claims filed were those of convertible obligation holders and scrip holders, each separately represented by appellants-petitioners' committees.

Under date of March 24, 1942, the AGECO Trustee petitioned for an order determining the validity of some

*For the convenience of the Court, the Summary Statement of the matter involved is in all respects similar to that contained in the petition of the Ageco COAB Committee, except for special references pertaining to the particular securities.

**A glossary of the abbreviations used herein precedes the petition.

***References are to folio numbers unless otherwise noted.

of those claims and dividing the claims into classes according to their nature (4). Objection to the types of claims enumerated in the Trustee's petition were thereafter filed by the Trustee and by various other parties (31-255).

On October 27, 1942, the District Court referred these claims and objections to Honorable Frederick E. Crane, as Special Master, "to hear the evidence on the issues raised by said claims and objections and to report his findings of fact and conclusions of law as to the validity, priorities and proper division into classes of said claims" (256-289). The Special Master held hearings at which evidence was taken (5) and, on March 31, 1943, filed his report, including his findings of fact and conclusions of law (586-789). The Special Master recommended, among others, that the COAB and Scrip claims should be classified as subordinate to general creditors.

The report thereupon came on for confirmation before the District Court and objections thereto were duly filed (6; 790-809).

Apart from certain claims which are not material to this petition, the relevant claims treated in the Special Master's report fall into five types:

1. Holders of Convertible Debenture Certificates and Convertible Debenture Obligations without fixed maturities (CDCs).
2. Holders of Convertible Certificates (CCs) and Old Convertible Obligations (Old COs) without fixed maturities.
3. Holders of Convertible Obligations, Series A and B Due 2002 (COABs), or Preferred or Preference Stocks, who obtained their COABs or stock in exchange for CDCs, and who still hold the

COABs or stock thus obtained (Original Holders of COABs).*

4. Other Holders of COABs or Preferred or Preference Stocks.

5. Holders of Interest Bearing and Non-Interest Bearing Scrip (IB and NIB Scrip).

At a hearing held on April 14, 1943, the Trustee of AGECO moved that the District Court pass only on certain parts of the Special Master's report, findings of fact and conclusions of law. It appeared in the District Court that a Plan of Compromise and a Plan of Reorganization had been proposed by the AGECO Trustee and AGECORP Trustees and that these Plans made some provisions for Types 1 and 3 (833-839). The order of the District Court dated August 13, 1943, only reviewed conclusions of law 5 and 6 of the Special Master's Report, and the findings of fact relating to those conclusions, and classified the types of claims represented by the petitioners-appellants as subordinate to general creditors of AGECO pursuant to the Bankruptcy Act, Sec. 197 (862; 892-904). The order confirmed certain parts of the Special Master's report but deferred consideration of those types of claims (Types 1 and 3) for which some provision had been made in the Plan of Compromise and Plan of Reorganization, and reserved jurisdiction to pass on the portions of the Special Master's Report relating to them (840-904).

No provision was made for Types 2, 4 and 5, in the proposed Plan of Compromise or the proposed Plan of Reorganization. The Debtor's financial condition is such that subordinate creditors will not participate in any Plan of Reorganization and they accordingly have been

*We do not include in the phrase "Original Holders of COABs", persons who acquired their COABs otherwise than on an exchange of CDCs, even if they acquired their COABs directly from AGECO.

given no recognition in a plan recently proposed by the Trustee of AGECO and the Trustees of AGECORP (838-840), which Plan of Compromise and Plan of Reorganization were approved by an order of the District Court dated September 12, 1944, pursuant to Section 144 of the Bankruptcy Act.

Inasmuch as no provision was made for Types 2, 4 and 5 in the Plan of Compromise or Plan of Reorganization, any decision with respect to the fairness of these plans is necessarily dependent, therefore, upon a proper judicial determination that the claimants represented by petitioners are subordinate creditors. The District Court recognized that it was not possible to determine *favorably* the rights of these claimants without an adjudication of the status of the CDCs and the original holders of COABs but the District Court believed that *adverse* determinations could be made on uncontested findings of fact of the Special Master without consideration of the entire record and without adjudicating the status of the CDCs and original holders of COABs. Accordingly, the District Court proceeded to a determination of the claimants of Types 2, 4 and 5, held that they were subordinate to general creditors, and entered an order so classifying them (839-862; 892-904). The District Court did not consider the remaining findings and conclusions of the Special Master but *assumed* that the issues therein involved would be resolved in favor of appellants (843). The District Court passed only upon those findings of fact and conclusions of law of the Special Master that were relevant to this classification and adopted them with minor modifications (897-903). The findings of fact thus adopted by the District Court are set forth in Appendix C to the opinion of the District Court (874-891).

The effect of the order appealed from is to exclude from participation in the limited funds of the debtor, all holders of Scrip, with the exception hereinafter discussed of Scrip in the hands of Original Holders.

The COABs were in effect divided by the order appealed from into two different classes: Class 1 consisted of Holders of COABs due 2002, Series A and B, which had been issued in exchange for CDCs and which remain in the hands of the persons to whom they were originally issued or their personal representatives. This class participates in the limited funds of the Debtor by participation in the Plans of Compromise and Reorganization. Class 2 consisted of Holders of Convertible Obligations Due 2002, Series A and B, which were in the hands of persons other than the original holders of CDCs who had exchanged them for COABs. This class includes transferees of persons who had originally held CDCs or persons who had exchanged them for CCs, old COs or for cash. This class does not participate in the limited funds of the Debtor and has been excluded by the Court order appealed from.

The scrip, however, was not divided into classes, although part of the outstanding scrip was issued to persons in each of the above two classes. Thus scrip owned by Original Holders of COABs (Class 1) was held subordinate to general creditors and treated in the identical manner as scrip in the hands of transferees (Class 2). The Circuit Court of Appeals in the last paragraph of its opinion observed that "this seems doubtful on the court's own theory" (p. 336).

The petitioners-appellants represent all holders of scrip which were described hereinbefore as Type 5.

All of the Scrip was issued in payment of interest on the COABs (340-342). Most of the COABs were issued by the Debtor in exchange for CDCs (751). On May 31, 1932, there were outstanding in the hands of the public, CDCs in the amount of $36,333,539 (306). On January 10, 1940, there were CDCs outstanding which had not been surrendered in the sum of $3,808,527 (333-334). The CDCs, CCs and old COs were all by their terms con-

vertible at the *company's option* except under certain conditions, into specified classes of its preferred or preference stocks.

The CDCs, CCs and old COs were all purportedly debt securities of AGECO. The CCs and old COs, however, contained subordination clauses substantially like the one that is in the COABs and the IB and NIB scrip (874). The essential difference between the CDCs and the COABs is that the COABs as well as the CCs and old COs contain a subordination clause whereas the CDCs do not. The subordination clause in the scrip certificates (554-555) provides in part as follows:

> "It is the intent hereof that this Certificate shall be subordinate to the following (hereinafter called 'Senior Obligations'), namely: all indebtedness of the Company, now or hereafter issued and outstanding, except (1) the 5%, 5½%, 6½%, and 7% Convertible Obligations, Series A and 6% Convertible Obligations, Series A and B, of the Company and (2) indebtedness or obligations convertible at the option of the Company into stock of the Company of any class or subordinated by their terms to other indebtedness or obligations of the Company;"

The subordination clause in the COABs is substantially the same (880-881; 554-555).

The District Court held, in approving the Plan of Reorganization and Plan of Compromise of AGECO that FIOs (Fixed Interest Obligations) unconditionally payable as to both principal and interest on specified dates issued pursuant to indentures with Corporate Trustees, was general unsubordinated debt of AGECO. The District Court likewise held that CICs (Convertible Investment Certificates) unconditionally payable as to both principal and interest on specified dates, was likewise senior

or general unsubordinated debt of AGECO. The CICs, however, by their terms were convertible at the *option of the company* into preferred stock of the company.

The CDCs by their terms were not subordinate to other obligations of AGECO (703). The CDCs by their terms become due on the happening of certain specified events, to wit:

"(a) Default in the payment of interest;

(b) Adjudication of AGECO as insolvent and permanent Receivers appointed for its property;

(c) Becoming bankrupt and voluntary or involuntary petitions being filed;

(d) Upon the transfer of all or substantially all of its assets unless the acquiring company assumed the obligations of AGECO under the CDCs (fols. 690-2)."

Prior to 1931 AGECO experienced certain financial difficulties. In 1931 and 1932 AGECO became further involved in financial difficulties and the notorious Mr. Hobson began his financial manipulations, which resulted in his eventual conviction and imprisonment. On April 19, 1932, the COABs were issued pursuant to authority contained in resolutions adopted by the Board of Directors of AGECO (875).

In May of 1932, AGECO first notified holders of CDCs, CCs and old COs that AGECO was exercising its option to convert those securities into stock; at the same time AGECO offered the security holders an option to take the then newly authorized COABs in place of the stock into which they were purportedly being converted. Some security holders held on to their CDCs, CCs and old COs; some exchanged them for stock; the others, the vast majority, took COABs (876). It is estimated that the

bulk of the CDCs in the approximate amount of $30,000,000 or more, were exchanged for COABs (751).

In 1936 and 1937 AGECO paid interest, in the form of IB and NIB scrip, to all holders of COABs, however issued or acquired.

Both the COABs and Scrip were assignable, and many of them were sold or transferred by their original holders (884; 890). Some Scrip remained in the hands of original holders.

The principal amount of Scrip outstanding on January 10, 1940, when the Debtor was adjudicated a bankrupt was $10,199,780.83.

The basic contention was made in this litigation before the District Court that AGECO's conversion privileges with respect to the CDCs, CCs and old COs were invalid and that, even if valid, the options to convert were improperly exercised.

The District Court did not rule on these contentions but asssumed in favor of appellants that the exchanges of CDCs for COABs were invalid and that original holders of COABs have a right to rescind the transactions (843).

The Court, nevertheless, ruled that all persons who hold IB or NIB scrip have no right to complain of the assumed invalidity of the CDC exchanges (852-853).

The Special Master found in his Report that CDCs 1931 Series, which were valid and outstanding, were *unsubordinated general debt* of AGECO and entitled to participate as such in the funds of AGECO (788). The Special Master also found that scrip by its terms *was not subordinate to CDCs* of any issue which was valid and outstanding (676).

The District Court however held that the subordination provisions in the COABs and scrip were valid and enforceable in bankruptcy (854-857). Accordingly an order was entered classifying the claims of all COABs (except original holders of COABs) and scrip, as subordinate to

general creditors other than the holders of obligations convertible at AGECO's option into stock (897-898; 900). This is the order which was affirmed by the Circuit Court of Appeals and which petitioners-appellants now seek to review.

This Court Has Jurisdiction.

The jurisdiction of this Court is invoked under subdivision (c) of Section 24 of the Bankruptcy Act, as enacted June 22, 1938.

The date of the entry of the order, judgment and decree of the Circuit Court of Appeals, sought to be reviewed, is July 14, 1944 (R., p. 337). This petition, presented within three months after the entry of the aforesaid order, is timely.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 143 F. (2d) 640. The opinion is also printed in full in the Record (R., pp. 324-337). The opinion of the United States District Court for the Southern District of New York is reported at 53 F. Supp. 107. The opinion is also printed in full in the Record (R., pp. 271-297).

The Circuit Court of Appeals has in this case decided important questions of general law in a way probably untenable and against the weight of authority, and important questions of federal law which have not been, but should be, settled by this Court (Supreme Court Rule 38 [5] [b]).

As stated by the United States Circuit Court,

> "the issue involves peculiarly interesting questions of priority and subordination of corporate bonds in that the District Court has made a distinction between original holders and transferees of certain bonds and has subordinated the claims of transferees to an extent which it has not been prepared

to go with respect to the claims made by original holders of the same bonds" (R., p. 325).

The decision of the Circuit Court of Appeals as to the validity and enforceability of subordination agreements in bankruptcy and its interpretation of Section 65-a of the Bankruptcy Act, particularly where the subordination agreements in question have been obtained without consideration, and through fraud and misrepresentation, is probably untenable and against the weight of authority, and involves an important question of federal law which has not been but should be settled by this Court (Supreme Court Rule 38 [5] [b]).

The decision of the Circuit Court of Appeals as to the legality of an option of a corporation to convert its bonds into stock, is probably untenable and against the weight of authority and involves an important question of general law (Supreme Court Rule 38 [5] [b]).

The decision of the Circuit Court of Appeals as to the legality of an option of a corporation to convert its bonds into preferred stock upon the fulfilment of certain conditions precedent and the question of whether such conditions were properly fulfilled prior to the exercise of said option, was improper, erroneous and departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision where the District Court assumed that the issues involved would be decided in favor of appellants (843) and the respondents likewise assumed that the issue involved would be resolved in favor of appellants (Supreme Court Rule 38 [5] [b]).

The decision of the Circuit Court of Appeals erroneously sustained the procedure and order of the District Court which confirmed only certain conclusions of law and findings of fact pertaining to appellants' substantive

rights without disposing of other issues of fact and law equally necessary for the full adjudication of the rights and status of the appellants herein. The procedure of the District Court sanctioned by the Circuit Court of Appeals was erroneous and prejudicial to the rights of the appellants where the report of the Special Master was rendered on all the issues and the issues herein were indivisible. This unusual and novel procedure accounts for the necessary assumptions made by the District Court in appellants' favor of the undetermined findings of fact and conclusions of law. The Circuit Court of Appeals recognized the unfairness of this mode of procedure (R., p. 331) and attempted to remedy it by erroneously ruling on all the issues, even those not determined by the District Court (R., pp. 332-334). The Circuit Court of Appeals thus sanctioned the departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision (Supreme Court Rule 38 [5] [b]).

Questions Presented.

The questions presented herein involve important questions of both procedural and substantive law. It is contended that the procedure adopted by the District Court as well as the Circuit Court of Appeals exceeded their jurisdiction and departed substantially from the accepted and usual course of judicial proceedings. The substantive issue, as stated by the Circuit Court of Appeals, "• • • involves peculiarly interesting questions of priority and subordination of corporate bonds • • •". The following questions must be considered by this Court:

1. Assuming that creditors (holders of Scrip) were induced by their debtor through fraud or mistake to

agree to subordinate their debt to other creditors, without any additional consideration therefor, is the agreement to subordinate contained in these securities enforceable in a court of bankruptcy or equity?

2. Is a provision in a bond issued by a corporation, whereby the corporation at its option may convert the bond into stock, legal?

3. Is it against public policy for a corporation to issue a bond convertible at the option of the corporation into stock of the corporation?

4. Did the Circuit Court of Appeals err and exceed its jurisdiction in determining issues assumed by the District Court to have been decided in favor of appellants?

5. Was the procedure adopted by the District Court, and sanctioned by the Circuit Court of Appeals, of determining certain, but not all, of the issues pertaining to the Scrip correct and proper or prejudicial to the rights of appellants herein?

6. Is the Scrip by its terms subordinate to any issue of CDCs or 5½% CICs?

7. If the Scrip is not subordinate to CDCs or CICs of any issue, which are valid and outstanding, is the Scrip entitled to stand and share on a parity in the funds and reorganization of the debtor with the CDCs and CICs who participate and share as general creditors of AGECO.

8. Do the subordination provisions and terms of the Scrip make the Scrip an "illusory promise" so as to give their holders a cause of action against AGECO as general creditors?

Reasons Relied on for Allowance of the Writ.

1. The question of the power of a corporation to issue a bond convertible at the option of the corporation into stock has never been raised in any case other than the instant case, and has never been passed upon by any court, with the exception of the court below.

2. The Circuit Court erred by approving the procedure of the District Court. The District Court exceeded its jurisdiction by passing upon only certain issues pertaining to the COABs and by assuming the other issues in the case to be in their favor. It was impossible to fully determine in their favor the rights of these claimants without an adjudication of all the issues presented, although this would incidentally involve an adjudication of the status of the CDCs and the original holders of COABs who were participating in the Plan of Compromise and Reorganization. The District Court's opinion that adverse determinations could be made against appellants on certain issues without consideration of the entire record and all the issues, prejudices the rights of the appellants who were entitled to have all the substantive issues determined on their merits in one appeal. The procedure of the District Court sanctioned by the Circuit Court of Appeals in effect splits one appeal into several. It must be recognized that the effect of this ruling may be that after argument of this case on the limited issues presented before this Court, if the contentions urged by the appellants are upheld, it will then first become necessary to go back to the District Court for a determination of the other issues and further appeals may then be taken to the Circuit Court of Appeals and thereafter possibly to this Court. This procedure is unquestionably prejudicial to the rights of appellants and only results in a multiplicity of legal proceedings.

3. The substantive questions involved have a public aspect and are of genuine intrinsic public importance which call for their most authoritative determination. The questions involved concern the administration by a federal court of the estate of an insolvent quasi-public company and its reorganization. The liquidation or reorganization of such large holding companies both by the federal courts and by the Securities and Exchange Commission, a quasi-judicial and administrative branch of our government, has become increasingly frequent and it may reasonably be assumed from past experience that such reorganizations will occur in the near future. It is essential in the public interest that the questions here presented be reviewed and finally be settled.

4. The questions as to the validity and enforceability of subordination agreements in bankruptcy under Section 65A of the Bankruptcy Act, particularly where the subordination agreements in question, as assumed by the record below, were obtained without consideration and through fraud and misrepresentation, has never been adjudicated by this Court, so far as our research indicates, and involves an important question of federal law which has not been but should be settled by this Court.

5. The interests at stake and the number of persons affected are very substantial. Involved herein is the elimination, in the distribution of an estate, of claims of over $10,000,000 in principal amount. Involved are the rights of over 36,000 general creditors spread throughout our land who rightfully look to the courts for a fair and equitable administration and distribution of this insolvent estate. Nor is this merely a controversy between private interests in the usual sense, since the questions involved concern hundreds of thousands of investors who daily trade in these securities and others of similar char-

acter. It follows that the acts of the Federal courts and administrative branches of the Federal Government who have the duty to supervise the liquidation or reorganization of such quasi-public corporations, shall not violate the United States Constitution and that the petitioners and those similarly situated shall be accorded every protection which the Constitution affords.

6. The public interest and administration of justice will be subserved by this Court's review and by the correction of the patent discrimination and injustice which petitioners believe to inhere in this proceeding.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case, and that the said decree of the United States Circuit Court of Appeals, for the Second Circuit, may be reversed by this Honorable Court, and that your petitioners may have such other, further and different relief in the premises as to this Honorable Court may seem just and proper, and your petitioners will ever pray.

Dated, New York, October 11, 1944.

Respectfully submitted,

THATCHER C. JONES,
Chairman of Scrip Holders
Protective Committee, Petitioners.

LOUIS BOEHM,
BERNARD D. FISCHMAN,
Of Counsel.

Supreme Court of the United States

No. .....

TERM A. D. 1944.

IN THE MATTER

OF

ASSOCIATED GAS AND ELECTRIC COMPANY,
Debtor,

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

—o—

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,
Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,
Respondents and Appellees Below.

Brief in Support of Petition for Writ of Certiorari.

BOEHM & FISCHMAN,
Attorneys for Petitioners.

LOUIS BOEHM,
BERNARD D. FISCHMAN,
Of Counsel.

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ASSOCIATED GAS AND ELECTRIC COMPANY,

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THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,

Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents and Appellees Below.

Brief in Support of Petition for Writ of Certiorari.

Opinions of Courts Below.

The report and opinion of the Special Master is printed at folios 586 to 789 of the Transcript of Record.

The opinion of the District Court is printed at folios 811 to 862 of the Transcript of Record and is reported in 53 F. Supp. 107. The opinion of the Circuit Court of Appeals is printed at pages 324 to 337 of the Transcript of Record and is reported in 143 F. (2d) 640.

Jurisdiction.

1. The date of the judgment to be reviewed is July 14, 1944.

2. The statutory provision which is believed to sustain the jurisdiction of this court is subdivision (c) of Section 24 of the Bankruptcy Act as enacted June 22, 1938.

Statement of the Case.

The essential facts have been set forth in the foregoing petition. They may very briefly be epitomized.

The holders of Ageco Scrip in the principal amount of $10,199,780.03 have been classified as subordinate creditors for the purpose of excluding them from participation in the assets of the estate. The basis of the proposed exclusion is a subordination provision contained in the scrip certificates. The scrip was issued in payment of interest on the COABs. The COABs were issued in exchange for CDCs. We contend the exchange should be set aside because it was based on a fraudulent exercise of an alleged option contained in the CDCs enabling Ageco to convert the CDCs into stock at the option of the corporation. We contend that that provision was illegal. Since the CDCs were not subordinate to general creditors, the scrip, which represents interest on the CDCs should not be classified as subordinate to general creditors.

Specification of Errors.

The Circuit Court of Appeals affirmed the order classifying the scrip as subordinate to general creditors of

Ageco. The decision was upon the ground that the provision enabling Ageco to convert the CDCs into stock at Ageco's option was legal. That decision was erroneous for two reasons:

1. It ignored the statutory provisions and the public policy against a provision enabling a corporation to convert its bonds into stock at the option of the corporation.
2. It results in an inequitable windfall to other security holders of Ageco, violative of the constitutional guarantee of equal protection of laws.

ARGUMENT.

POINT I.

A provision for conversion of a corporate bond into stock at the company's option is unlawful and invalid.

There is no statutory authority for making securities convertible at the option of the issuer. The only section of the New York statutes which authorizes convertible securities is Section 16 of the Stock Corporation Law, which authorizes a stock corporation, with the consent of its stockholders, to

> "confer *on the holder* of any debt or obligation secured or unsecured the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the directors conferring the right of conversion, into stock of the corporation."

No authority was cited by the Circuit Court for upholding the validity of the provision for conversion into stock *at the Company's option.* In fact, the only New York

authority on the subject is an opinion of the Attorney General rendered to the Department of State on November 22, 1934, in which the Deputy Secretary of State in charge of corporations was advised that he could not accept a certificate of incorporation which gave authority to the corporation to issue bonds and debentures convertible into stock of the corporation *at the option of the corporation.*

The opinion of the Attorney General in its entirety is as follows:

"22nd November 1934

Department of State
The Capitol
Albany, N. Y.

Attention Hon. Frank S. Sharp
Deputy Secretary of State

Dear Sirs:

You have submitted to me the proposed certificate of incorporation of The Joker Corporation, presented to you for filing under the provisions of Article 2 of the Stock Corporation Law, and requested my opinion as to whether the same is entitled to be filed in view of the underscored portion of the following provision thereof:

'The Corporation to have the power to borrow money, and from time to time to make, accept, endorse, execute and issue bonds, debentures, promissory notes and other obligations of the Corporation for moneys borrowed or in payment for property acquired or for any of the other objects or purposes of the Corporation or its business, and to secure the payment of any such obliga-

tions by mortgage or pledge, or by other lien upon, or assignment of any part of the property of the Corporation, *and to provide in and by such bonds and debentures that the same shall be, at the option of the Corporation, to be exercised by a majority of the board of directors of the Corporation, convertible into stock of the Corporation under such terms as the Corporation may provide in such bonds and debentures.'*

Section 16 of the Stock Corporation Law confers upon every stock corporation other than a moneyed corporation the power to borrow money when necessary for the transaction of its business, for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation, and to issue and dispose of its obligations for any amount so borrowed and, with the consent of the holders of not less than two-thirds of the total number of shares outstanding entitled to vote thereon, to mortgage its property and franchises to secure the payment of any such obligations, or of any debt contracted for such purpose. The section further provides that, when authorized by like consent, the directors, under such regulations as they may adopt, may confer on the holder of any debt or obligation, secured or unsecured, the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the directors conferring the right of conversion, into stock of the corporation.

It will be observed that, under the statute, the option of conversion rests with the stockholder and not with the corporation, as the proposed certificate assumes to provide.

> The provisions which may be inserted in a certificate of incorporation of a stock corporation are enumerated in section 5 of the Stock Corporation Law. That section does not provide, either directly or inferentially, that a certificate may provide for the issuance of bonds or debentures convertible into stock of the corporation, at the option of the corporation. Nor do I find elsewhere evidence of a legislative intent that such a provision is permissible.
>
> You are accordingly advised that the proposed certificate is not entitled to be filed in its present form."

This opinion of the Attorney General of the State of New York is cavalierly disposed of by the Circuit Court of Appeals as the "opinion of an unnamed Deputy Attorney General—without citation—wherein there is no analysis of the background of the statute or of the possible reasons for the provisions contained in it" (143 Fed. [2d] 640, 645). This criticism of the opinion of the Attorney General is completely unfounded. The opinion of the Attorney General is short but sound. It is based on the lack of statutory authority for the issuance of a bond convertible at the company's option into stock. As will hereinafter be seen, the lack of statutory authority for such a provision renders it invalid. Moreover, as will also hereinafter be seen, an "analysis of the background of the statute" completely supports this conclusion.

In *Lisman* v. *Milwaukee, L. W. & W. Ry. Co.*, 161 Fed. 1020 (C. C. A. 7), doubt was expressed as to whether an option given to the holder of an obligation to convert it into stock is valid without statutory authority; and in *Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 17, it was held that a common law right to issue bonds does not include a right to issue bonds convertible, at the holder's option, into

stock. The situation with respect to the CDC's is even stronger than in the cases just mentioned because Section 16 of the New York Stock Corporation Law provides only for a limited right of conversion, *i. e.*, a conversion by holders, not by the corporation.

It is not disputed that the right to issue a bond with a conversion feature is not found in the common law at all. If a corporation organized under the laws of the State of New York seeks to sustain such a power, it must be based on the General Corporation Law and the Stock Corporation Law of the State of New York. If one examines the various provisions of said statutes the conclusion is inevitable that a corporation does not have the right to issue a security convertible at its option. It is also very significant that there never has been a corporation other than Ageco which even attempted to issue such a type of security. The question is *sui generis*, stands alone, and has never been passed upon by this court. In the entire history of financial manipulation no other corporation ever attempted to issue this type of security. Hopson was the arch swindler to resort to this device.

The applicable sections of the Stock Corporation Law are briefly the following:

Section 11, which provides that a corporation may issue common and preferred stock.

Section 12, which provides that a corporation may issue stock of no par value.

Section 14, which provides that a corporation may issue stock to its employees.

Section 16, which provides that a corporation may borrow money.

Section 16 gives a corporation the right in borrowing money to issue bonds which, at the option of the *holder*, may be converted into stock. In that section there is no reciprocal right given to a corporation to issue a

bond which it may convert at *its own* option. Had it been the intention of the Legislature to confer on the *corporation,* as well as on the owner, the power to convert a bond into stock would it not have said so? The fact that the power was granted to the creditor but not to the debtor is most significant of the legislative intention to grant no such power to the debtor corporation.

Section 27 of the Stock Corporation Law gives a corporation the right to issue stock which may be converted at the holder's option into another class of stock. Again no reciprocal right is given to a corporation.

A corporation is merely a creature of the State. It has no vitality and no powers except such as are conferred upon it by the Legislature.

In *Aberdeen Bindery Inc.* v. *Eastern States Printing & Publishing Company,* 166 Misc. 904, 906 (App. Term), the Court stated:

> "Being a creature of law, it did not have the same rights or powers as individual persons, but only such as were expressly given or which arose by necessary implication from law. In England they had been created by the King's grant or by Act of Parliament through royal assent. In the United States corporate powers can be granted only by legislative act."

The New York General Corporation Law Section 13 specifically provides:

> "A corporation shall not possess or exercise any powers unless given by law or necessary to the powers so given."

It certainly cannot be said that it is necessary to enable a corporation to borrow money that it shall have the right *at its option* to convert the debt into stock. The very fact

that of all the many thousands of corporations in the United States which have borrowed untold billions of dollars from the public the only one that has resorted to this device was Ageco, demonstrates that such power is unnecessary to the raising of money. In fact, the reservation of such a privilege by a corporation attempting to borrow money would not only not assist it but would actually hinder the corporation from borrowing money from an intelligent investor.

The law is well settled that a limited authorization excludes a different and broader authorization (except, of course, as to purely incidental powers). See: *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24, at 48; *Fletcher*, Vol. 7, *Cyclopedia Corporations*, Sec. 3648, and cases there cited; *Case* v. *Kelly*, 133 U. S. 21; *Pratt* v. *Short*, 79 N. Y. 437. It was held in *Knickerbocker Imp. Co.* v. *Assessors*, 74 N. J. L. 583, that the creation by the Legislature of a precise method by which, under certain conditions, stock may be retired and cancelled means that the corporation shall accomplish the same result in no other way. The same reasoning is applicable to Section 16 of the Stock Corporation Law, namely, that there may be a conversion of debt into stock at the option of the holder, but that there is no such option on the part of the corporation.

The Circuit Court of Appeals, nevertheless, sustained the validity of the provision enabling Ageco to convert the CDCs into stock. The Circuit Court of Appeals based its conclusion on a mistaken analysis of the history of Section 16 of the Stock Corporation Law. The Circuit Court, at page 645 of its opinion, stated:

> "The history of the statute and its precursors show that the restrictions it contains on certain forms of borrowing and of obligations were designed for the protection of the stockholders as a

whole and as a limitation on formal or more general previously existing powers."

The Circuit Court of Appeals reasoned that the statute provided only for bonds convertible at the *holder's* option into stock because the statute was designed solely for the protection of stockholders. The Circuit Court of Appeals sought to explain the absence of a provision in the statute authorizing the issuance of bonds convertible at the *company's* option into stock on the ground that such a provision is unnecessary for the protection of stockholders, but rather of creditors.

The Circuit Court of Appeals, however, was in error in believing that the statute was intended solely for the protection of stockholders. The statute was also intended to protect creditors. *In re Progressive Wallpaper Corp.*, 230 Fed. 171, (D. C., N. D., N. Y., 1916), the Court, in discussing the prior statute, at page 176 stated:

> "As an original proposition under the section of the statute referred to, it would seem plain to this court that the requirement of the consent of the stockholders *was not for the benefit or protection of the stockholders alone,* but for the protection and benefit of the corporation itself *and the benefit and protection of the creditors of the corporation.* The statute itself does not declare that it is for the protection of the one any more than for the protection of the other. It is now elementary law and well decided that the directors of a corporation hold its property in equity as a trust fund for the benefit of the creditors of such corporation and also for the benefit of the stockholders. The proceeds of such property is to be applied in equity, first to the discharge of the debts of the corporation, and the surplus, if any, goes to the stockholders. In fact, stockholders cannot take the assets of the corpora-

> tion for their own benefit to the exclusion of the creditors, and hence a provision for the benefit of the stockholders is a provision for the benefit of the creditors of such corporation. * * *
>
> "That which is for the benefit of the stockholders of a corporation is primarily for the benefit of the creditors of such corporation, inasmuch as unencumbered property owned by such corporation is in equity a trust fund in the hands of the officers and directors, for the benefit of and to be applied first to the payment of creditors, and the balance, if any, to be divided amongst the stockholders on the winding up of the corporation."

Similarly, in *Hamilton Trust Co.* v. *Clewes*, 17 App. Div. 152, aff'd 163 N. Y., 423, the Court in discussing former Section 6 of the Stock Corporation Law, from which Section 16 was derived, said at page 156, that the object of the statute was

> "to protect the corporation, its stockholders, and, in proper cases, its creditors, against the improvident and wrongful acts of the officers of the corporation."

Thus, the Circuit Court of Appeals was mistaken in its assumptoin that the statute was designed solely for the protection of stockholders and, for that reason, contained no provision for bonds convertible at the *company's* option into stock. The statute did not provide for such an option because the legislature did not intend to authorize it!

The question of the legality of an option of a corporation to convert its bonds into stock is not merely a question of New York law. It is a question affecting every corporation in the United States. The question is: Does the power of a corporation to borrow money include the power to issue a bond convertible at the option of the corporation into stock? The Circuit Court answered this

question in the affirmative (Record, p. 333). It is a question of paramount public importance, which should be answered by this Court.

As appears from page 333 of the record, the Circuit Court of Appeals referred to our plea of public policy but did not otherwise discuss or reply to it. Our argument of public policy against a provision of this type requires no extended discussion. We submit that an option of a corporation to convert its bonds into stock is a wholesale invitation to cheat the public, and could readily accomplish a fraudulent end. Its effect, for example, if exercised just prior to bankruptcy or insolvency, would be to give certain creditors a preference over others. The corporation would always exercise the option when it would be to its advantage to do so. This court should declare the public policy against such an option before the opportunity is grasped again to sell to the American public a security convertible at the company's option into stock.

POINT II.

The order appealed from results in an inequitable windfall to the other security holders of Ageco, violative of the constitutional guarantee of equal protection of laws.

The elimination of the scrip from participation in the reorganization of Ageco would result in a gross inequity. If the scrip is eliminated, a holder of a Convertible Obligation participates equally whether or not he owns the scrip which was issued in payment of interest on his Convertible Obligations. Certain of the holders of Convertible Obligations who received them in exchange for Convertible Debenture Certificates have sold or parted with their scrip. Some of them had sold their scrip to Associated Gas and Electric Company. Some of them used their scrip in payment of electric light and gas bills or the purchase of electric appliances from Associated Gas and Electric

Company. These holders of Convertible Obligations who have parted with their scrip have already benefited to the extent of the consideration received by them for their scrip. On the other hand, those holders of Convertible Obligations who still retain the scrip which was issued to them as interest on their Convertible Obligation have received no such benefit. It is inequitable to treat equally all holders of Convertible Obligations without regard to whether or not they still own the scrip which was issued to them in payment of interest. The only remedy for this obviously unfair result is to provide participation for the scrip holders. Otherwise, holders of CO's who sold their scrip will be unjustly enriched at the expense of holders of CO's who retain their scrip, which plainly violates the constitutional guarantee of equal protection of the laws.

Conclusion.

It is therefore respectfully submitted that this case is one which calls for the exercise by this Court of its supervisory powers in order that the order of affirmance of the Circuit Court of Appeals which operates to exclude many thousands of creditors from participation in the estate, may be presented to this Court for consideration and decision, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals, and finally reverse the same.

Respectfully submitted,

BOEHM & FISCHMAN,
Attorneys for Petitioners,
Thatcher C. Jones, et al.

LOUIS BOEHM,
BERNARD D. FISCHMAN,
Of Counsel.

Nos. 590 and 591.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

IN THE MATTER

of

ASSOCIATED GAS AND ELECTRIC COMPANY,

Debtor.

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

No. 590

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,

Petitioners,

against

STANLEY CLARKE, TRUSTEE OF ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents.

No. 591

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,

Petitioners,

against

STANLEY CLARKE, TRUSTEE OF ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Glossary of Abbreviations.

Ageco—Associated Gas and Electric Company, Debtor.

CCs—Convertible Certificates without fixed maturities.

CDCs—Convertible Debenture Certificates and Convertible Debenture Obligations without fixed maturities.

CICs—5½% Convertible Investment Certificates, due November 15, 1938.

COABs—Convertible Obligations, Series A and B, due 2002.

Elias Committee—Petitioners in No. 590, Irving Elias, Max Menachen and Michael Moise, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, All Series (Exclusive of Those Holders Who Acquired Same by Direct Exchange for Original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company.

Jones Committee—Petitioners in No. 591, Thatcher C. Jones, Frederick T. Sutton and Russell M. Van Kirk, constituting the Scrip Holders Protective Committee of Associated Gas and Electric Company.

Old COs—Convertible Obligations without fixed maturities.

Original Holders of COABs—Holders of COABs who obtained such securities in exchange for CDCs and still retain those securities.

Scrip—Interest Bearing and Non-Interest Bearing Scrip.

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 590 AND 591

IN THE MATTER

of

ASSOCIATED GAS AND ELECTRIC COMPANY,

Debtor.

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

No. 590

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,

Petitioners,

against

STANLEY CLARKE, TRUSTEE of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents.

No. 591

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,

Petitioners.

against

STANLEY CLARKE, TRUSTEE of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (pp. 324-338)* is reported in 143 F. (2d) 640. The opinion of the United States District Court for the Southern District of New York (811-891) is reported in 53 F. Supp. 107.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on July 14, 1944 (p. 337). The petitions for writs of certiorari in No. 590 and No. 591 were filed on October 12, 1944. The jurisdiction of this Court is invoked by petitioners under Section 24(c) of the Bankruptcy Act [11 U. S. C. §47 (c)].

Statement of Case.

The facts are for the most part sufficiently set forth in the petitions for writs of certiorari. We have these additional comments:

The judgment sought to be reviewed affirmed an order of the District Court, under Section 197 of the Bankruptcy Act (11 U. S. C. §597), which classified holders of Convertible Obligations, Series A and B, due 2002 (COABs)†, and Interest Bearing and Non-Interest Bearing Scrip (Scrip) of Associated Gas and Electric Company (Ageco) as subordinate to all general creditors except holders of obligations

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* Because of a confusion in folio numbers in printing the decision of the Circuit Court of Appeals, references to that decision are to pages of the Record and are preceded by "p.". Other references are to folio numbers of the Record.

† A glossary of the abbreviations used in this brief appears at page iv of this brief.

convertible at Ageco's option into stock (897-898; 899-900; p. 337).

There are various references in the petitions and supporting briefs to a Plan of Compromise and a Plan of Reorganization proposed by the Trustee of Ageco and the Trustees of Associated Gas and Electric Corporation. Neither of those Plans forms any part of the record in this case; as the Circuit Court of Appeals observed, "only the *fact* of compromise, and not the details of its terms, is before us at this time" (p. 325). Obviously, the fairness of those Plans to petitioners' constituents cannot be in issue here when the Plans themselves are not involved in this proceeding. The judgment sought to be reviewed did not pass on those Plans; it was concerned solely with the proper classification of the COABs and Scrip "for the purposes of *any* plan of reorganization of the Debtor" (897).

Petitioners' arguments based upon the recognition in the Plan of Compromise and the Plan of Reorganization of the claims of holders of Convertible Investment Certificates, due 1938 (CICs), holders of Convertible Debenture Certificates (CDCs), and Original Holders of COABs, are thus wholly irrelevant to this case. The appropriate time at which to attack the fairness of provisions contained in a particular plan is in a proceeding which contemplates the approval or confirmation of that plan. And this is not such a proceeding. The Plan of Compromise and the Plan of Reorganization to which petitioners refer were both approved by the District Court after the decision below was handed down. See *In re Associated Gas and Electric Company, et al.*, C. C. H. Bankruptcy Law Service ¶ 54, 990 (S. D. N. Y., August 25, 1944, Leibell, D. J.) (not officially reported). Petitioners among others have appealed from

the District Court's orders of approval; those appeals are now pending in the Circuit Court of Appeals.

The order here sought to be reviewed did not adjudicate anything as to the CICs, CDCs or Original Holders of COABs. The order merely reserved the claims of those security holders for later determination (904).

It is not clear just whom petitioners represent and what are the facts as to the claimants they represent.

Petitioners are not themselves claimants; they are committees for classes of security holders. Petitioners in No. 590—the Elias Committee—style themselves a "Protective Committee for the Holders of Convertible Obligations, due 2002, All Series, (exclusive of those Holders who Acquired same by Direct Exchange for Original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company" (910-911).

Petitioners in No. 591—the Jones Committee—style themselves the "Scrip Holders Protective Committee of Associated Gas and Electric Company" (907).

Despite the order of the Court requiring claims to be filed, petitioners filed no claims (3-4). Two claims of individual claimants are included by petitioners in the Record on Appeal (8-29); but those claimants neither were appellants in the Circuit Court of Appeals nor are they petitioners in this Court; nor have petitioners stated that the claim they wish to prosecute is based upon the facts set forth in those proofs of claim.

The facts as to petitioners' position remove from this case certain issues. For example, petitioners in No. 590,

the Elias Committee, suggest in their petition for certiorari as one of the questions presented (Petition, p. 14):

> "9. Is the New York Law applicable to the rights of all assignees and transferees of COABs?"

Apparently this question is based on the suggestion that some assignees or transferees may have acquired their securities under circumstances such that the law of some other State may be applicable. Nowhere is there any suggestion that petitioners represent any such persons, or if they do, what the facts are and which law it is that petitioners claim is applicable.

Similarly, petitioners in No. 591, the Jones Committee, devote almost their entire brief to the argument that the provision of the CDCs for conversion of the CDCs into stock at the Company's option is unlawful and invalid. But nowhere in these proceedings has it appeared, and nowhere does it appear in this record, that petitioners number among their constituents a single person who exchanged CDCs upon Ageco's exercise of its option.

The securities represented by petitioners—Convertible Obligations, Series A and B (COABs), and Interest Bearing and Non-Interest Bearing Scrip (Scrip)—all contain a subordination clause. The subordination clause in the COABs (877-881; 511-516) provides, in part, as follows:

> "It is the intent hereof that this Obligation and all other Obligations of this issue shall be subordinate to the following (hereinafter called 'Senior Obligations'), namely: all bonds, debentures and other indebtedness of the Company and of any successor corporation, now or hereafter created and outstanding, except (1) the Obligations of this issue and (2) indebtedness or Obligations convertible at the option of the Company into stock of the Company

of any class or subordinated by their terms to other indebtedness or obligations of the Company."

The subordination clause in the Scrip is substantially the same (888; 554-557).

The order of the District Court (897-898; 900) affirmed by the Circuit Court of Appeals (p. 337) merely enforces that clause by classifying all petitioners' constituents as subordinate to the general creditors of Ageco, except holders of obligations convertible at Ageco's option into stock.

Questions Presented.

The questions presented by the petitions for certiorari come down to these:

(1) Are the subordination clauses contained in the COABs and Scrip valid and enforceable in bankruptcy?

(2) Even assuming that Original Holders of COABs have a right to rescind the transactions whereby they received COABs in exchange for CDCs, did that right of rescission pass to transferee and other holders of COABs?

(3) Was the provision in the CDCs for conversion into stock at the Company's option invalid under New York law?

(4) Was the procedure in the District Court and in the Circuit Court of Appeals erroneous in that (a) the District Court merely decided questions "(1)" and "(2)" above

and thus found it unnecessary to pass on "(3)", while (b) the Circuit Court of Appeals also decided "(3)" above?

Petitioners in No. 591, the Jones Committee representing Scrip holders, have not presented question "(2)" above in so far as it relates to Scrip holders.

No question is presented as to whether, assuming the CDC conversion option to be valid, the Debtor, Associated Gas and Electric Company (Ageco), properly exercised it.

Respondents' Contentions.

We propose to show that:

I. No ground for certiorari exists.

II. The subordination provisions in the COABs and Scrip are valid and effective.

III. Any cause of action for rescission of exchanges of CDCs for COABs did not pass to petitioners' constituents.

IV. The provision for conversion of the CDCs into stock at the Company's option is valid under New York law.

V. The procedures of the District Court and the Circuit Court of Appeals were proper.

POINT I.

No ground for certiorari exists.

None of the grounds for certiorari specified in Rule 38(5)(b) of this Court exists, and no other ground is suggested.

1. There is no suggestion of a conflict between the decision of the Circuit Court of Appeals in this case and decisions of other Circuit Courts of Appeals on the same matter. Nor is there any suggestion of a conflict with any applicable decision of this Court.

2. The only question of Federal law involved in the case is the enforceability in bankruptcy of a subordination provision. That is a question upon which all Federal courts that have passed on it are in agreement; such provisions have uniformly been held valid. All that is involved is the application of this well settled rule to the particular language of the instruments in this case.

There are references in the brief to the increasing frequency of reorganizations of large "quasi public" holding companies by the Securities and Exchange Commission. But no question peculiar to such reorganizations is involved in the case.

The constitutional questions suggested by petitioners are without substance; and they were not raised below.

3. Petitioners do not cite any applicable local decisions of the New York courts inconsistent with the results reached below.

Only two questions of local (New York) law are seriously argued by petitioners. Those two questions are:

> a. Does a transfer of a security carry with it the transferor's cause of action for rescission of the transaction whereby he acquired the security; and

b. Does New York law permit and enforce a provision in a debt security of a New York corporation whereby the security may be converted into stock at the corporation's option?

These questions are discussed in Points II and III of this brief.

The first of these questions has been directly ruled upon, adversely to petitioners' contentions, by the New York courts. The second, so far as we know, has not been ruled on, but requires only elementary construction of the New York statute.

As bearing on the propriety of certiorari in this case we emphasize the relationship of these questions to the final result. Unless petitioners are correct in their contention that the subordination clause is ineffective and unenforceable on its face, petitioners can prevail only if they are successful on both these issues of New York law. The first of the issues as to local law has been conclusively determined against petitioners by decisions of the New York courts; and petitioners in No. 591, the Jones Committee (Scrip), do not even present this issue in their petition for certiorari or in their brief.

4. The contention most vigorously urged by petitioners in support of their petitions for writs of certiorari is that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

There was no such departure.

In the District Court petitioners contended that the CDC exchanges were invalid and that petitioners' constituents were in effect the assignees of the cause of action for rescission of those exchanges. The District Court held that

they were not the assignees of that cause of action and therefore found it unnecessary to rule upon the validity of that cause of action.

The Circuit Court of Appeals agreed with the District Court. But it went further and passed upon the merits of the cause of action for rescission of the exchanges.

Petitioners say that the District Court should have passed on the merits of the rescission cause of action and that the Circuit Court of Appeals should not have. It seems clear to us that the District Court, in the exercise of judicial economy, was not required to pass upon issues unnecessary to its final decision. And petitioners cannot complain that the Circuit Court of Appeals passed on the merits because, as the Circuit Court of Appeals pointed out, "petitioners have presented the case on the merits" (p. 331), and the Circuit Court of Appeals was merely deciding the question presented by petitioners.

We discuss the procedural aspects of the case in Point V of this brief.

POINT II.

The subordination provisions in the COABs and Scrip are valid and effective.

The order sought to be reviewed enforces the subordination provisions of the COABs and the Scrip according to their terms.

(1) Subordination agreements enforceable in bankruptcy.

It is now settled law that subordination agreements are enforceable in bankruptcy.

Bird & Sons Sales Corp. v. *Tobin,* 78 F. (2d) 371 (C. C. A. 8th, 1935) cited with approval in *Sampsell* v. *Imperial Paper & C. Corp.,* 313 U. S. 215, 219 (1941);

In re Aktiebolaget Kreuger & Toll, 96 F. (2d) 768 (C. C. A. 2nd, 1938);

St. Louis Union Trust Co. v. *Champion Shoe Machinery Co.,* 109 F. (2d) 313 (C. C. A. 8th, 1940);

Bank of America v. *Erickson,* 117 F. (2d) 796 (C. C. A. 9th, 1941);

In re George P. Schinzel & Son, Inc., 16 F. (2d) 289 (S. D. N. Y., 1926);

In re Handy-Andy Community Stores, Inc., 2 F. Supp. 97 (W. D. La., 1932).

The *Kreuger & Toll* case was an appeal from a classification order in a bankruptcy proceeding which subordinated holders of the bankrupt's "participating debentures" to its general creditors, as to both principal and interest. The

order appealed from was predicated on a subordination clause in the participating debentures. In overruling the appellant's contention that Sections 64(b) and 65(a) of the Bankruptcy Act prohibited enforcement of subordination contracts unless the creditor claiming the benefit of the contract was "a party to the contract or was the sole beneficiary", or unless there were an estoppel, the Circuit Court of Appeals said (at 770):

> "Section 64b of the Bankruptcy Act, as amended, 11 U. S. C. A. §104(b), for reasons of public policy, creates priorities regardless of the parties' contracts and overrides inconsistent covenants. But this does not mean that the parties are prohibited from making contracts for a priority or subordination in so far as they do not impinge upon statutory priorities. Section 65a of the act, 11 U. S. C. A. §105(a), means no more than that dividends paid to creditors shall be pro rata except where there is a priority given by law or by lawful contractual arrangement between the parties. *Bird & Sons Sales Corporation* v. *Tobin,* 8 Cir., 78 F. 2d 371."

(2) "Inconsistency" of the subordination provisions—relation to CDCs and to 5½% CICs, due 1938.

Petitioners make a great point of the fact that the subordination clauses do not subordinate their securities to indebtedness of Ageco but merely to all indebtedness "except * * * indebtedness or Obligations convertible at the option of the company into stock of the Company" (512; 555; 877). Petitioners say that there are securities—the CDCs and the 5½% Convertible Investment Certificates, due 1938 (CICs)—which are convertible at the Company's option into stock; that therefore the COABs and Scrip are not subordinate to, but are on a parity with, the CDCs and the CICs; that the CDCs and CICs do not

contain any subordination clause and that they are therefore on a parity with the other general creditors; that, since the COABs and Scrip are on a parity with the CDCs and the CICs, they must also be on a parity with the other general creditors, and that the subordination provisions consequently defeat themselves.

The argument poses a diverting paradox, but one which is resolved by the common sense rules of contract and marshalling. Contracts calling for subordination can be enforced even though the contract is for subordination to some, but not all, of the general creditors. All that need be done is to give, to the creditors in whose favor subordination exists, the share that would otherwise have gone to the subordinated creditors. Thus in the case at bar:

1. Determine the dividends or participations that would be distributable to general creditors, CICs, CDCs, COABs, Scrip, if all were on an equal footing.

2. Take the dividends or participations computed in this manner, and distributable to the COABs and Scrip, and add them to the dividends or participations going to only those general creditors to whom the COABs and Scrip have agreed to subordinate their claims.

The first step gives effect to the provision (if any) of the contract that the COABs and Scrip are not subordinate to the CDCs and CICs. The second step gives effect to the provision of the contract that they are subordinate to other general creditors. Thus, all provisions of the contract are enforced without any inconsistency.

This is exactly what was done in *Bird & Son Sales Corporation* v. *Tobin*, 78 F. (2d) 371 (C. C. A. 8th, 1935).

Accord:

In re George P. Schinzel & Son, Inc., supra;
In re Handy-Andy Community Stores, Inc., supra.

The only possible consequence of petitioners' argument is not to improve their position, but rather to affect adversely the relative participations of holders of CDCs and CICs as against other general creditors. That may affect the propriety of the orders confirming the Plan of Reorganization and Plan of Compromise, as against the objection of other general creditors; it does not affect the order of classification here sought to be reviewed.

POINT III.

Any cause of action for rescission of exchanges of CDCs for COABs did not pass to petitioners' constituents.

Petitioners say their constituents' rights are not circumscribed by the terms of their securities, including particularly the subordination clause, for the following reasons:

They assert that the provision in the CDCs for conversion into stock at the Company's option was invalid. (In the Courts below, but not in this Court, they argued that the transactions whereby certain COABs were issued in exchange for CDCs were induced by fraudulent misrepresentations as to the validity of the option, the propriety of its exercise by Ageco, and the compliance by Ageco with the conditions of the option.) Therefore, say petitioners, their constituents have the right to rescind those exchanges and become holders of CDCs, securities which have no subordination clause.

The Special Master (784; 645-665) and the Circuit Court of Appeals (pp. 332-336) both held that the exchanges were valid. Even if we assume for purposes of discussion—as did the District Court (843)—that the CDC exchanges were invalid for one reason or another, and that the transactions can be rescinded by Original Holders of COABs, still the security holders represented by petitioners have no standing to rescind the exchanges, and they derive no rights by virtue of the assumed invalidity of those exchanges.

(1) Petitioners in No. 590, the Elias Committee (COABs).

The Elias Committee represents no Original Holders of COABs—persons who received and still hold COABs

issued to them in exchange for CDCs. The representation of the Elias Committee is limited to holders of COABs "exclusive of those Holders who Acquired same by Direct Exchange for original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F" (910). Their appeal to the Circuit Court of Appeals was similarly limited (911).

It seems obvious that petitioners' constituents—who did not acquire their COABs through exchanges for CDCs—cannot complain of the invalidity of CDC exchanges made by someone else. This conclusion is reinforced when we consider how the present holders (other than Original Holders) did acquire their COABs. They acquired them either (a) directly from Ageco or (b) from some previous holder.

(a) *Acquisitions directly from Ageco.*

As the District Court found (883):

> "Many of the COABs now outstanding were not issued in exchange for CDCs, CCs or Old COs. Many COABs were issued in the first instance for cash or on exchange for securities of other companies."

If the COABs were issued for cash or for securities of other companies, the holders cannot complain of the invalidity of the CDC exchanges; that just had nothing to do with them.

If the COABs were acquired directly from Ageco on an exchange for Convertible Certificates (CCs) or Convertible Obligations without fixed maturities (Old COs), petitioners are not helped, for the CCs and Old COs contained subordination provisions substantially identical to those contained in the COABs (874). And so rescission would be of no avail in that case.

(b) *Acquisitions from previous holders.*

If the COABs transferred from previous holders were originally issued by Ageco to the transferors of the present holders otherwise than in exchange for CDCs, then obviously neither the transferors nor the present holders could complain of the invalidity of the CDC exchanges.

Petitioners recognize the foregoing facts, so that the argument of the Elias Committee on the rescission issue is directed, as we see it, exclusively to transferee holders of COABs whose transferors originally acquired the COABs on an exchange for CDCs. There are undoubtedly a large number of such transferee holders, though the record does not show that petitioners represent any of them.

Petitioners do not claim that any of their constituents obtained a specific assignment of any right of rescission that any transferors may have had, or that they knew or even were interested in the circumstances under which their transferors had acquired their COABs. Presumably the only written assignment executed was that contained on the back of the certificate, which read (884-885):

> "For Value Received the undersigned does hereby sell, assign and transfer unto..... the within Convertible Obligation of Associated Gas and Electric Company, and does hereby constitute and appoint ..... attorney to transfer said Obligation on the books of Associated Gas and Electric Company, with full power of substitution in the premises."

That assignment purported to be and was simply an assignment of the security, not of any cause of action that the transferor may have had for damages or rescission arising from fraud or misrepresentation in connection with the exchange of CDCs for COABs.

Under these circumstances, why should the transferees have any right of rescission? They were in no way misled or defrauded. They got just exactly what they bargained for and expected. They went into the market to get COABs —perfectly valid securities containing a subordination clause. They obtained those securities, not knowing or caring where or how their transferors had acquired them. Their rights are not enlarged because particular transferors may have had a cause of action for rescission or damages based upon the fraudulent character of the CDC exchanges. Indeed, the customary way of fixing damages for fraud in the sale of a security is for the defrauded party to sell his security. Surely no one supposes that his purchaser acquires any right based on the fact that the seller was originally induced to buy the security by fraudulent misrepresentations. *Cf. Kenedy* v. *Benson,* 54 Fed. 836, 838 (C. C. Iowa, 1893). The purchaser gets merely the security and the contractual rights set forth therein.

This rather obvious rule is well supported by the authorities. In the absence of a specific assignment of the cause of action, or special circumstances indicating an intent to assign the cause of action, the mere assignment of a security or contract does not carry with it a transfer of collateral causes of action, such as a rescission claim, which the assignor may have had and which does not have its origin in any provision of the transferred security or contract.

In *Abel* v. *Paterno,* 245 App. Div. 285 (1st Dept., 1935),* stock in a cooperative apartment corporation had been sold by fraudulent misrepresentations. The court held that original purchasers of the stock were entitled to damages

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* As the Courts below held (846-847, p. 330), the decisions of the New York courts are controlling in this case. *Manufacturers Trust Co.* v. *Kelby,* 125 F. (2d) 650 (C. C. A. 2nd, 1942), cert. den. 316 U. S. 697 (1942).

for deceit, but that persons who acquired the stock from original purchasers had no cause of action based on the misrepresentations; that cause of action was retained by their assignors. In *Fox* v. *Hirschfeld,* 157 App. Div. 364 (1913), a cause of action for damages for fraudulent misrepresentations which induced plaintiff to enter into a contract to purchase real estate was held not to be assigned by an assignment of the contract.

Accord:

People v. *S. W. Straus & Co.,* 158 Misc. 186, 208 (Ref. Rep., N. Y. Sup. Ct., 1935) confirmed in this respect 158 Misc. 222 (N. Y. Sup. Ct., 1936);

Kenedy v. *Benson,* 54 Fed. 836 (C. C. Iowa, 1893);

Steele v. *Brazier,* 139 Mo. App. 319 (1909).

Similarly, the assignee of a contract does not acquire a cause of action which his assignor had for a breach of contract occurring before the assignment.

Hanna v. *Florence Iron Co.,* 222 N. Y. 290 (1918);

Hendry v. *Title Guarantee and Trust Co.,* 255 App. Div. 497 (1st Dept., 1938), affd. 280 N. Y. 740 (1939);

Schaffer v. *Vandewater & Co., Ltd.,* 160 App. Div. 803 (1914);

Smith v. *Continental Bank & T. Co.,* 292 N. Y. 275 (1944).

(2) Petitioners in No. 591, the Jones Committee (Scrip).

These petitioners contend that the CDC exchanges were invalid. But neither in their petition for certiorari nor in their supporting brief do they present or argue the

question of how they—holders of Scrip issued as interest on COABs—can take advantage of that invalidity.

The Scrip was issued by Ageco in 1936 and 1937 as interest on all outstanding COABs (887), in accordance with the authority contained in the COABs (384; 504).

This Scrip was issued to all holders of COABs whether or not they formerly held CDCs; none of it was issued to people who still held unsurrendered CDCs (887).

Persons to whom Scrip was issued have (a) nothing to rescind and (b) no relation whatever to the CDC exchanges.

(a) Suppose the Scrip holders did have a right to rescind, what would that rescission consist of? They received the Scrip from the Company in satisfaction of the obligation for interest on the COABs. If they rescinded, presumably they would return the Scrip to the Company and would have merely the Company's obligation for interest on the COABs—an obligation that would still be subordinate to general creditors in accordance with the subordination clause in the COABs (878).

(b) Holders of Scrip cannot rescind the CDC exchanges. They did not receive the Scrip as part of the CDC exchange transactions, but as part of entirely different transactions several years later. The very terms of the certificates characterize the Scrip as interest on the COABs, not on the CDCs (534-535, 541, 542, 551, 553).

Indeed, the very basis of the Scrip holders' rights is inconsistent with any rescission claim. For the Scrip represents interest on the COABs. Unless the COABs are validly outstanding, there is no right to interest. If the transaction whereby the COABs was acquired is rescinded,

there may be a right to interest that would have been paid on the CDCs; but that right is in no sense represented by Scrip issued as interest on COABs.

Many Scrip certificates were sold or transferred by their original holders (890). The assignment form in the case of Scrip is substantially the same as that in the case of COABs (890-891). What we have said about transferee holders of COABs is *a fortiori* applicable to transferee holders of Scrip.

POINT IV.

The provision for conversion of the CDCs into stock at the Company's option is valid under New York law.

The Jones Committee for Scrip holders (petitioners in No. 591) contends that the New York statute prohibits a provision such as that in the CDCs giving Ageco the option to convert the CDCs into stock on certain conditions.

The point is one of construction of the New York statute. It has been ruled on adversely to petitioners by the former Chief Judge of the New York Court of Appeals sitting as Special Master (645-651) and by the Circuit Court of Appeals sitting in New York (pp. 332-334). (The District Court did not pass on the issue.)

The statute involved is New York Stock Corporation Law, Section 16. At the time here involved, the relevant provisions of that statute were:

> "Every stock corporation other than a moneyed corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for such purposes. The consent to the execution of such mortgage, except a purchase-money mortgage, by the holders of not less than two-thirds of the total number of shares outstanding entitled to vote thereon * * * shall be required. * * * When authorized by like consent, the directors, under such regulations as they may adopt,

> may confer on the holder of any debt or obligation, secured or unsecured, the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the directors conferring the right of conversion, into stock of the corporation."

The statute thus requires the consent of two-thirds of the stockholders for the issuance of an obligation convertible into stock at the holder's option. Petitioners contend that from this it follows that a corporation may not issue obligations convertible into stock at the corporation's option at all, whether or not two-thirds of the stockholders consent. They cite no case so holding or intimating.

We suggest that a more reasonable interpretation of the statute is that it merely imposes the requirement of two-thirds consent of stockholders on the right of corporations to issue obligations convertible into stock at the holder's option; and that the right to issue securities convertible at the corporation's option, not being mentioned in the statute, is not affected by it.

As the Circuit Court of Appeals pointed out, the provision of the statute upon which petitioners rely is not a grant of power but rather "a limitation on formal or more general previously existing powers" (p. 333).

That this is true as matter of history was pointed out in *Market & Fulton National Bank* v. *Jones,* 7 Misc. 207, 209 (N. Y. Sup. Ct. [1894] affd. 90 Hun 605 [1895]). The court there, considering the mortgage provision of this statute, said (7 Misc. at 209):

> "At common law any corporation, unless restrained by some provision of its charter, was permitted to mortgage its property in payment of its debts, or to secure money borrowed for business purposes (*De Ruyter* v. *St. Peter's Church,* 3 N. Y. 238;

Curtis v. *Leavitt*, 15 id. 9), but this right was curtailed by the general act * * *."

Accord:

R. F. C. v. *Eastern T. C. R. Corp.*, 266 App. Div. 148 (1943).

It is also true as matter of existing law. In the language of the New York Court of Appeals (*Jacobs* v. *Moncton R. I. Corp.*, 212 N. Y. 48, 56 [1914]):

> "I know of no principle of law which, as to commercial transactions within their [corporations] chartered powers and involving the receipt or borrowing of, and the obligation to repay, moneys, denies the entire freedom to regulate them by such a contract as the parties are willing to enter into."

Accord:

Hess v. *Sloane*, 66 App. Div. 522, 525 (1901), affd. on opinion below 173 N. Y. 616 (1903).

The first sentence of the statute grants to stock corporations the general "power to borrow money and contract debts" and to "issue and dispose of its obligations for any amount so borrowed." That power is complete except in so far as expressly limited. There is an express limitation of two-thirds consent for the issuance of obligations convertible into stock at the holder's option. There is no limitation and certainly no prohibition upon the issuance of such obligations convertible at the corporation's option.

There being no prohibition on the issuance of obligations convertible into stock at the Company's option, the provisions to that effect contained in the CDCs are valid and enforceable.

POINT V.

The procedures of the District Court and the Circuit Court of Appeals were proper.

(1) The District Court.

Petitioners complain that the District Court should not have decided their case without adjudicating the rights of the holders of unsurrendered CDCs and Original Holders of COABs.

Petitioners were not prejudiced by the procedure adopted by the District Court, for that procedure assumed all issues as to the right of Original Holders of COABs to rescind the CDC exchanges to have been decided in petitioners' favor. If, on that assumption, the case must still be decided adversely to petitioners, then petitioners were benefited, not hurt, by this procedure; it resulted in a speedy decision of their case and an early opportunity to have that decision reviewed.

We think it obvious that the control of the District Court over the administration of its business is sufficiently flexible to permit this speedy and just result. That power is reaffirmed by Rules 42(b) and 54(b) of the Federal Rules of Civil Procedure, which are applicable in this proceeding (General Order in Bankruptcy 37).

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> "JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which

> is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Commenting on this rule, this Court said in *Reeves* v. *Beardall,* 316 U. S. 283, 285 (1942):

> "That rule, the joinder provisions (see Rules 13, 14, 18, 20), and the provision of Rule 42 which permits the court to order a separate trial of any separate claim or issue, indicate a 'definite policy' (*Collins* v. *Metro-Goldwyn Pictures Corp., supra,* 106 F. 2d page 85) to permit the entry of separate judgments where the claims are 'entirely distinct'. 3 Moore, Federal Practice, Cum. Supp. 1941, p. 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. *Bowles* v. *Commercial Casualty Ins. Co.,* 4 Cir., 107 F. 2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of', though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institutes, Washington & New York (1938), p. 329."

Accord:

> *Collins* v. *Metro-Goldwyn Pictures Corp.,* 106 F. (2d) 83, 84, 87 (C. C. A. 2nd, 1939);
>
> *Crutcher* v. *Joyce,* 134 F. (2d) 809 (C. C. A. 10th, 1943);
>
> 3 *Moore's Federal Practice* (1938) 3157.

What happened in the case at bar is this: Holders of CDCs, COABs, Scrip, and other securities not involved on these appeals, filed separate proofs of claim. Those claims were tried together because they seemed to involve many common questions of law and fact. In addition to the invalidity of the CDC exchanges alleged to be common to many of the claims, there were separate issues relative to petitioners' constituents' claims that did not exist in connection with the other claims. Those issues were whether the subordination provisions were valid and whether the alleged invalidity of the CDC exchanges vested any rights in petitioners' constituents. The decision of those issues determined the rights of petitioners' constituents.

The claims of petitioners' constituents having been decided, the District Court had power to enter an order classifying those claims immediately (Section 197 of the Bankruptcy Act, 11 U. S. C. § 597). It was not required to postpone entry until the determination of other claims —which were tried together with the claims of petitioners' constituents for convenience only. The District Court determined the claims represented by petitioners and certain other claims (839; 897-903) and reserved jurisdiction as to the balance (839-840; 904).

(2) The Circuit Court of Appeals.

The "assumption" in the District Court as to the validity of the cause of action for rescission of the CDC exchanges was, of course, an assumption for the purpose of considering whether petitioners' constituents were assignees of that cause of action. On that "assumption", the District Court held they were not assignees of that cause of action.

The Circuit Court of Appeals agreed with the District Court, on the same "assumption" (pp. 330-331). But because petitioners "have presented the case on the merits" (p. 331), the Circuit Court of Appeals also considered whether the "assumption" really fit the facts and decided that it did not and that the exchanges were valid.

Petitioners complain that the District Court should have considered these "merits". They also complain that the Circuit Court of Appeals should not have considered the merits. The Circuit Court of Appeals was entirely justified in doing so, and petitioners cannot complain of it.

Petitioners in No. 590 (COABs), in their statement pursuant to Rule 75(d) of the Federal Rules of Civil Procedure "of the points on which said appellants intend to rely" (933) in the Circuit Court of Appeals, included the precise issue upon which the Circuit Court of Appeals ruled (938):

> "11. The Special Master erred in failing to find that COAB Certificates which were received in exchange for CDC's should be restored to their original position as CDC Certificates and as such, entitled to participate in the reorganization or liquidation of AGECO Estate and its funds on a parity with the general unsubordinated creditors of AGECO."

Petitioners in No. 591 (Scrip) in their statement "of the points on which said appellants intend to rely" (918) in the Circuit Court of Appeals included the same issue with respect to their constituents (923-924, Point 11).

And the point was thoroughly briefed by petitioners in the Circuit Court of Appeals.

It was the fact of the presentation and argument of these issues to the Circuit Court of Appeals by petitioners that induced that Court to pass upon the issues. Thus,

after discussing the case on the "assumption" below, and agreeing with the District Court, the Circuit Court of Appeals said (p. 331):

> "Nevertheless we think it unfair to the appellants, who have presented the case on the merits, to rest a decision on an assumption which seems so thoroughly opposed to the realities."

Petitioners complain that the record is not as complete as they would have wished for the determination of this issue. But as the Circuit Court of Appeals pointed out (p. 334):

> "Appellants have brought up all the record they wished and have presented the case quite thoroughly on the merits. We do not think the proceedings should be further delayed against the remote chance —not suggested by appellants—that they may be able to point to some active fraud in fact upon the part of the Company which would overturn the master's finding."

Despite their complaint that the record is not complete, petitioners have not suggested either in the Circuit Court of Appeals or in this Court what, if anything, has been omitted that is at all material to the decision made by the Circuit Court of Appeals.

Indeed, in this Court the only issue argued on the "merits" is a sheer issue of law whether a provision for conversion of debt securities into stock at the Company's option is valid. No elaboration of the record could affect the answer to that question of law.

Having designated the merits as among the points on which they intend to rely in the Circuit Court of Appeals,

and having briefed the merits at length in that Court, petitioners are in no position to complain that the Court considered their arguments and rejected them. That is not a departure from the usual course of judicial procedure.

Conclusion.

The decision of the Court below is correct, and no sufficient reason has been advanced for its review by this Court. The petitions for writs of certiorari should therefore be denied.

Dated, New York, N. Y., November 3, 1944.

Respectfully submitted,

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Supreme Court of the United States

No. 590.

TERM A. D. 1944.

IN THE MATTER

OF

ASSOCIATED GAS AND ELECTRIC COMPANY,
Debtor,

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,
Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,
Respondents and Appellees Below.

Reply Brief in Support of Petition for Writ of Certiorari.

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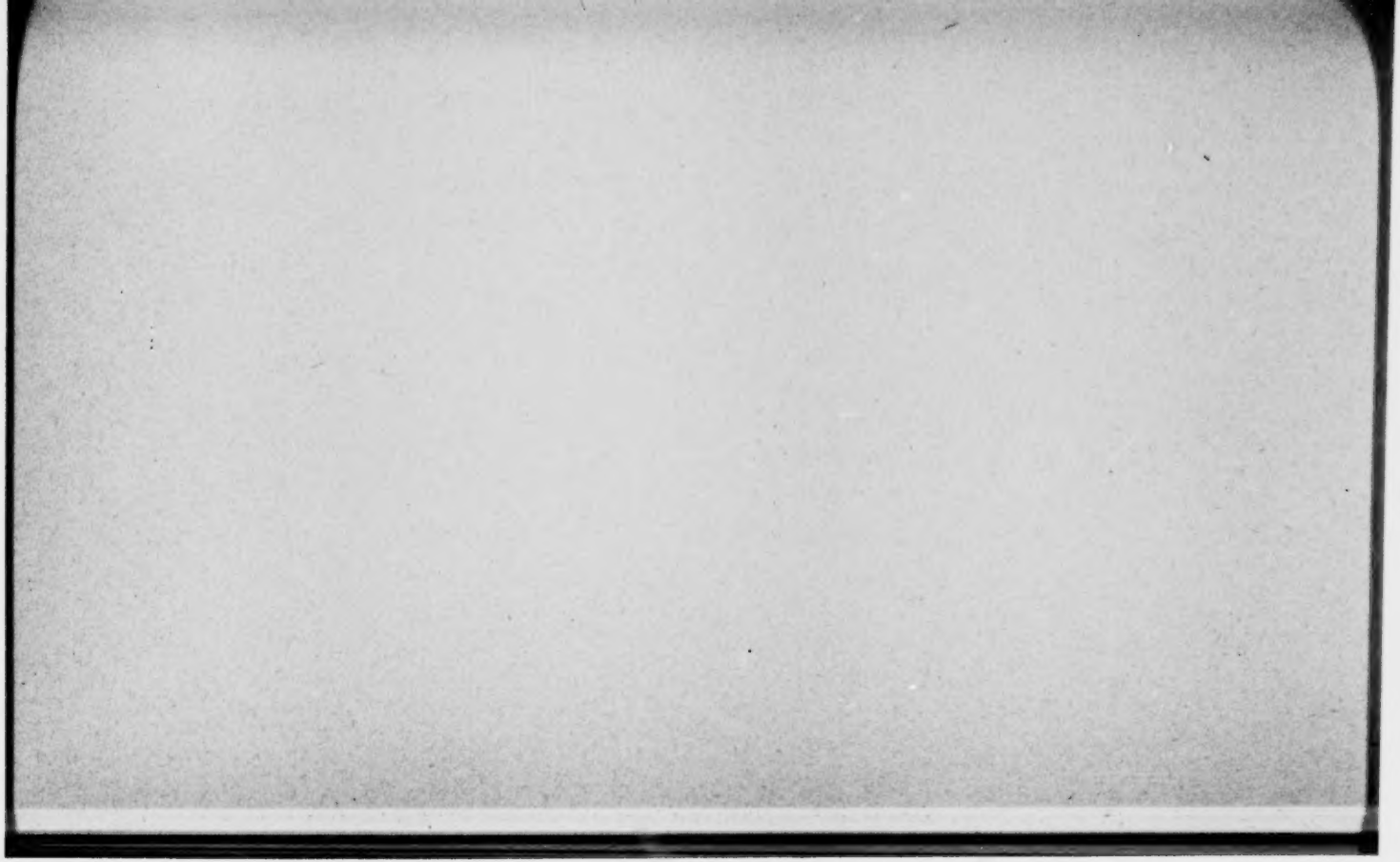

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Supreme Court of the United States

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IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,

Petitioners and Appellants Below,

AGAINST

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents and Appellees Below.

Reply Brief in Support of Petition for Writ of Certiorari.

Replying to Respondents' Statement of Case.

On page 4 of respondents' brief it is stated

> "It is not clear just whom petitioners represent and what are the facts as to the claimants they

> represent. * * * Petitioners are not themselves claimants, they are committees for classes of security holders."

The "Elias" committee for holders of convertible obligations due 2002, petitioners in No. 590 have been authorized by the Securities and Exchange Commission to solicit and represent the Holders of Convertible Obligations Due 2002, All Series (exclusive of those holders who acquired same by direct exchange for original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company.

All of the members of the "Elias" Committee personally own Convertible Obligations Due 2002 of Associated Gas and Electric Company which were purchased in 1937. The records filed in the Securities and Exchange Commission disclose that the "Elias" Committee represented in its inception holders of Convertible Obligations aggregating $643,000 principle amount.

The "Elias" Committee has appeared and actively participated in all court proceedings involving these securities.

No objection has ever been raised to the status or standing of the "Elias" Committee in these proceedings. Nor have other representatives of these securities participated in these proceedings.

The "Elias" Committee represents the individual claimant, Lester Martin, whose claim is included in the Record on Appeal (8-29).

Formal intervention by a Protective Committee is not required under the present Bankruptcy Act.

In re Philadelphia and Reading Coal and Iron Co., 105 F. 2nd 358, 3rd Circuit, the Circuit Court of Appeals said:

> "The fact nevertheless remains that the Congress has provided that all creditors and stockholders

and their attorneys, agents, and committees on their behalf have the right to be heard on all questions and to be compensated for services rendered in a reorganization proceeding. The latter right which is given by Sections 242 and 243 of Chapter X, 11 U. S. C. A. Sec. 643, 643 is not conditioned upon formal intervention."

It has been repeatedly held that bondholders can be heard on appeal although they have not formally intervened.

In re Day & Meyer, Murray & Young Inc., 2nd Circuit, 93 F. 2nd 657;
In re Barclay Park Corporation, 2nd Circuit, 90 F. 2nd 595.

Replying to Point 5 and Point 1 of Respondents' Brief.

Petitioners in Docket No. 590 (COABs) raised the contention that the Circuit Court of Appeals erred and exceeded its jurisdiction by passing upon issues *not* presented by the record on appeal. Particularly where the issues involved were assumed by the District Court in favor of appellants and hence were not presented in the record on appeal.

These issues involved the question of whether AGECO's conversion privileges with respect to the CDCs were valid and legal and the further question (assuming AGECO's conversion privileges were valid) of whether the necessary conditions precedent existed and the options to convert were properly exercised. Petitioners indicated that the Circuit Court of Appeals in passing upon these issues, assumed in appellants' favor by the District Court, seriously prejudiced the substantive rights of the petitioners who contended that the subordination agreement was void

as a matter of contract law since it was obtained through fraud and without any additional consideration.

Respondents in their answering brief seek to create the impression that the petitioners in No. 590 (COABs) raised these issues on their merits before the Circuit Court of Appeals and hence are in no position to complain that the Court considered their arguments and ruled upon them.

The respondents state:

> "It was the fact of the presentation and argument of these issues to the Circuit Court of Appeals by petitioners that induced that Court to pass upon the issues."

This statement is entirely untrue and misleading insofar as the petitioners in No. 590 (COABs) are concerned.

The petitioners in No. 590 representing only the holders of COABs have *never* presented or argued these issues before the Circuit Court of Appeals. They have consistently taken the position and contended that these issues were necessarily assumed in their favor by the District Court for the purpose of ruling upon only certain limited issues and any decision of the Circuit Court of Appeals must be predicated upon these assumptions in appellants' favor.

It is true that the petitioners in Docket No. 591 (Scrip) erroneously presented and argued these issues before the Circuit Court of Appeals but this presentation cannot be attributed to the other petitioners-appellants (COABs) who are entirely independent, and represented by separate counsel.

The respondents by answering both petitioners jointly in one brief have implied that both petitioners, the "Elias" and the "Jones" Committees raised these issues before the Circuit Court of Appeals which is misleading.

The contention made by respondents that the petitioners herein designated these issues as one of the points on which appellants intend to rely (938) is likewise untrue.

Paragraph numbered "11" which is quoted does not in any wise raise the issue that AGECO's conversion privileges with respect to the CDCs were invalid or illegal or (assuming AGECO's conversion privileges were valid) that the necessary conditions precedent existed and the options to convert were properly exercised. The point indicated assumes these issues in appellants' favor (as the District Court did) and states that the COAB certificates received in exchange for CDCs should be restored to their original position as CDC certificates and as such participate in the reorganization on a parity with the general unsubordinated creditors of AGECO. This point is fully elaborated in Point B of petitioners' brief (No. 590) in support of its petition for a writ of certiorari and by no means raises the issues contended.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reversing said decision.

Respectfully submitted,

HARRY O. LEVIN,
Counsel for "Elias" Protective Committee for Holders of Convertible Obligations Due 2002, et al., Petitioners.

ABRAHAM MITNOVETZ,
Of Counsel.

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Supreme Court of the United States

No. 591

TERM A. D. 1944

IN THE MATTER

of

ASSOCIATED GAS AND ELECTRIC COMPANY,

Debtor,

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,

Petitioners and Appellants Below,

against

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, et al.,

Respondents and Appellees Below.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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against

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Respondents and Appellees Below.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted in reply to the respondents' brief in opposition to the petition for a writ of certiorari in the above matter.

At page 4 of the respondents' brief, it is contended that it is not clear whom petitioners represent, and that the petitioners are not creditors of the estate.

The petitioners herein are the Jones Committee. The Jones Committee represents all holders of Associated Gas and Electric Company scrip. The Jones Committee has appeared and actively participated in all Court proceedings involving the Ageco scrip. It represents approximately $1,500,000 principal amount of Ageco scrip. No objection has ever been raised either in the District Court or in the Court below as to the status or standing of the Jones Committee in these proceedings. Throughout the litigation before the Special Master, the Jones Committee was the only representative of the scripholders. It represents, among others, the individual claim of T. W. Phillips Gas & Oil Company whose proof of claim is included in the Record on Appeal (19-30). The Jones Committee filed with the Securities & Exchange Commission the statements required by the Public Utility Holding Company Act, and the regulations thereunder.

Formal intervention by a Protective Committee is not required under the present Bankruptcy Act.

In re *Philadelphia and Reading Coal and Iron Co.*, 105 F. 2d 358, 3rd Circuit, the Circuit Court of Appeals said:

> "The fact nevertheless remains that the Congress has provided that all creditors and stockholders and their attorneys, agents and committees on their behalf have the right to be heard on all questions and to be compensated for services rendered in a reorganization proceeding. The latter right which is given by Sections 242 and 243 of Chapter X, 11 U. S. C. A. Sec. 643, is not conditioned upon formal intervention."

It has been repeatedly held that the right to appear and be heard includes the right to appeal (In re *Day & Meyer, Murray & Young, Inc.*, 2nd Circuit, 93 F. 2d 657; In re *Barclay Park Corporation*, 2nd Circuit, 90 F. 2d, 595). In addition, the respondents overlook the following paragraph in the scripholders proof of claim filed in this proceeding

by the T. W. Phillips Gas & Oil Company as the owner of $112,300 of Ageco scrip.

> "Deponent is advised and believes that the claims herein made are equally applicable to all holders of Scrip certificates of the Debtor, and deponent respectfully requests that the claims hereby made, if sustained, inure to the benefit of all holders of Scrip of the Debtor, whether or not similar claims have been filed by them herein" (28-29).

Petitioners have a direct interest in this case and are the sole representatives of the scripholders in asserting their claims. The above contention of the respondents was not raised either in the District Court or in the Court below. It may not be raised for the first time in this Court.

At page 5 of respondents' brief they contend that it does not appear in this record that the petitioners represent a single person who exchanged his CDCs upon Ageco's exercise of its option. Here again the respondent overlooks the proof of claim of T. W. Phillips Gas & Oil Co. which recites as follows:

> "Said Scrip certificates were issued purportedly in payment of interest upon Convertible Obligations due February 15, 2002, of the Debtor, which said Convertible Obligations were issued by the Debtor in purported exchange for Convertible Debenture Certificates of the Debtor pursuant to a purported conversion of Convertible Debenture Certificates into shares of preferred stock of the Debtor" (22).

Dated, New York, November 15, 1944.

Respectfully submitted,

BOEHM & FISCHMAN,
Attorneys for Petitioners.

LOUIS BOEHM,
BERNARD D. FISCHMAN,
of Counsel.